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HARRY MORGAN et al.,
Appellees,

v.

LOCAL 1150, UNITED ELECTRICAL,
RADIO AND MACHINE WORKERS OF
AMERICA et al.,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

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MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Harry Morgan filed a complaint in equity seeking injunctive and other relief against Local 1150, United Electrical, Radio and Machine Workers of America, as well as certain of its officers and members who had expelled him from membership in the union for alleged misconduct after trial by its executive board. Pursuant to a hearing embracing more than 500 pages of the record, the chancellor found the equities in favor of plaintiff, and entered a decree which declared that the action of the executive board and the local's confirmation of the expulsion were null and void; directed certain defendants to expunge the records of expulsion from the records of the local and its executive board; and enjoined certain defendants from acting on or enforcing the expulsion order. Defendants appeal.

United Electrical, Radio and Machine Workers of America, hereinafter called the UE, is a national labor organization made up of employees engaged in the manufacture of electrical machinery, products and equipment, to which persons normally employed are eligible for membership, regardless of skill, age, sex, nationality, color, religious or political belief or affiliation. The parent body is governed by a written constitution, the principal central bodies provided for therein consisting of a district council within each of 12 geographical districts made up of representatives of the locals in the district, a general executive board, composed of the principal

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national officers elected annually by the convention, a general vice-president elected annually by the locals in each district, and the annual convention to which all locals elect delegates according to the size of their membership. Locals are empowered to adopt their own constitutions and by-laws, provided they do not conflict with the laws of the governing body, and copies of their constitution are required to be submitted to the national office for approval by the general executive board.

With respect to disciplining its members, the UE constitution provides in substance that if a member of the union commits an offense "against the Constitution and By-Laws or the general good and welfare of his local union, or of the International Union, he shall be given an impartial trial by his local union as provided in the by-laws of said local union"; that the offense for which he is charged is to be presented in writing to his local union by the member making the charges, who at the time must be a member in good standing of the parent body; that a copy of the charges is to be given to the member accused; that either side shall have the right to appeal to the district council, which is empowered to select from its body a committee to investigate the facts and hold such hearings as may be deemed necessary; that further appeals may be taken to the general executive board of the UE, and from that body to the ensuing convention; and that the decision of the local shall be final until otherwise decided by a higher body.

Local 1150 of the UE is made up of employees in a number of Chicago plants, including the Chicago Flexible Shaft Company. It adopted its constitution and by-laws through vote of its membership late in March 1944 pursuant to notice published in the Chicago UE News, an official publication. These by-laws provide for a local executive board, consisting of representatives elected from the various shops on the basis of the size of their members-

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and the annual convention to which all locals elect a representa-
vice-president elected annually by the assembly, and a president,
national officers elected annually by the assembly, and a secretary,

ship. Long before adoption of its written constitution a similar board, elected on the same basis, had functioned in the local union.

The newly adopted constitution of the local union vested it with power to suspend, fine or expel members for violation of the constitution or by-laws "or unbecoming conduct of a member." It provided that no member shall be fined, punished or expelled until he has been given an impartial trial and found guilty of charges that may have been preferred against him. With respect to trials it provides that the person so charged "shall be notified of such charges by the Corresponding-Recording Secretary," that the charges must be in writing, that on trial of a member on any charge the members of the executive board shall sit in trial, hear evidence, render decisions of guilty or not guilty, and determine the punishment; and that an appeal may be taken from such decision to the district and further to the national union.

It appears that a copy of the local constitution was sent to the national office of UE on May 12, 1944. Subsequent to the events out of which this litigation arose, the union's general president, in a letter of October 31, 1944, called attention to two details in the local constitution not involved in this proceeding which were at variance with the national document, and he stated that upon receiving word that the local had modified these provisions he would submit the constitution to the general executive board for approval. This was done, and the local's constitution was approved on March 19, 1945.

A considerable portion of the record deals with complaints about Morgan's conduct as the local's chief shop steward at the Chicago Flexible Shaft Company, beginning early in 1944. Members of the local union made repeated trips to its downtown office to lodge these complaints, sometimes singly, sometimes in groups.

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...elected on the same basis, but functioned in
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This newly adopted constitution of the local union vested
in it the power to appoint, hire or suspend members for violation
of the constitution or by-laws. The corresponding section of a
previous constitution provided that no member could be expelled
or expelled until he had been given a fair hearing and that
the hearing be held within a reasonable time after the charge
was made. The new constitution provided that the person so
charged "shall be given a fair hearing by the corresponding
executive committee" and that the hearing must be in writing, that
on trial of a member on any charge the members of the executive
committee shall be the judges, and that the members of the
committee be not less than five and not more than nine; and that in
no case shall the hearing be held in the local union and that
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A considerable portion of the record deals with complaints
about Morgan's conduct as the local's chief steward at the
Chicago Flexible Sheet Company, beginning early in 1944. Members
of the local union made repeated trips to its downtown office to
 lodge these complaints. Sometimes orally, sometimes in writing.

The complainants were severe in their condemnation of Morgan, urging his removal as chief steward and his expulsion from the union, and there is evidence that some of the members argued that they ought "to remove a man who is at the helm of the Union and who is against the Union." These complaints related to his interference with distribution of the union paper, planning to create a local of his own, failure to give notice of meetings, rebuking committee members in the presence of company officials, removal of stewards who opposed him, paying a steward to support him at meetings, overcharging the local on an expense claim, and abusing and slandering the union. Without reciting in detail the voluminous testimony adduced upon the hearing by members of the union with respect to the various complaints, it may be said that there was abundant evidence to support many of the charges. Morgan denied some of the charges outright, and as to others he testified that he had been misquoted. Plaintiff's counsel in his brief takes the position that "the truth or falsity of the charges against Morgan, or whether they were proved, is immaterial because the essence of appellants' argument is not based on this. Consequently there will be no recital of facts by appellees regarding the substance of the charges." In view of his statement we may assume that the final action of the board, expelling him from membership in the union, was predicated upon competent evidence sustaining the charges lodged against him.

The record discloses that despite the complaints of his fellow members against Morgan, Pat Amato, president of the local, and Irving Krane, its business manager, discouraged taking action against him, and urged the members to show forbearance and try to work the matter out amicably. However, the complaints continued and finally on June 16, 1944 the executive board of the local heard the testimony of five complainants and had their statements transcribed and then read back to them for corrections

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and signed. After some discussion the board adopted motions to suspend Morgan as chief shop steward until his case could be heard, and to call a special meeting for that purpose on June 27. Morgan was then notified of the executive board's decision in a registered letter dated June 19, signed in the name of the local's recording-secretary. The letter stated that he would receive a copy of the charges in writing and would be informed of the meeting to consider them, which he would be expected to attend. He acknowledges having received that letter on June 23. The written charges were handed to Morgan June 20 by Krane, business manager of the local, at a shop meeting of the members employed at the plant. At that meeting Amato, president of the local, assumed the chair in lieu of Morgan, Krane read the charges but referred all inquiries concerning same to the executive board. Morgan testified that before the meeting Krane had told him that he would not be allowed to speak at the hearing. However, after Krane had read the charges, Morgan was asked whether he wanted to be heard. In response to that inquiry he addressed the meeting and asked to be tried by the shop meeting rather than by the executive board. Two other members, Churchill and Giampapa, joined in this request but were overruled. Thereafter, upon motion from the floor, the charges were put to a vote of the shop meeting by showing hands, and upon motion that the charges be accepted as read, Morgan concedes that "possibly a few more than half agreed."

The registered letter of June 21, 1944 sent to Morgan, signed by authority of the recording secretary, stated that the executive board would hold its hearing on the charges "January 27th," obviously a typographical error for June 27. Morgan received that letter on June 23. A second registered letter was sent to him, correcting this mistake, but delivery was delayed because Morgan was not at home. He testified that in mailing notices to his home the local had disregarded his verbal instructions that his mail

be directed to the plant, and he also claims that at first he was misled by the notice he received and actually believed that the meeting would be held seven months later. Nevertheless, on the advice of counsel, he appeared at the hearing on the evening of June 27, accompanied by his attorney, and several others, one or more of whom were non-members of the union. President Amato opened the meeting by announcing its purpose, and stated that a record of the meeting would be taken. A motion was carried to exclude those who were not members of the local, which had the effect of excluding his attorney and other non-members. Before leaving the room his counsel made a statement objecting to the action which deprived his client of counsel at the hearing, and also read to the board a prepared motion to expunge and dismiss the charges. Morgan then requested and was granted the floor. He complained of the exclusion of his attorney, and stated that he would make no attempt to defend himself. However, others who had accompanied him to the meeting, spoke from time to time denying or refuting statements which were made, offering evidence to show Morgan's loyalty to the union, and challenging the board's right to hear and decide the case. Thereafter the charges were read by Krane, and numerous witnesses were called who gave testimony in support of the various complaints lodged against Morgan. Just before the close of the meeting, which lasted about an hour and ten minutes, Morgan left voluntarily after making a final statement to the board, and upon conclusion of the testimony all non-members of the executive board were required to leave the room, when a vote was taken. Two of the board members who had filed charges against Morgan did not vote, neither did Amato, the president, nor Krane, the business manager. The executive board adopted a motion to expel Morgan from membership. At the next general membership meeting of the local, Krane reported the action that had been taken and suggested that the membership

could approve the board's action by accepting the report. A motion to that effect was made and carried. Thereafter by letter of June 28 Morgan was notified of the executive board's decision and its approval by the board, and advised of his rights of appeal under the local's constitution to the district council and thereafter, if necessary, to the national union. He was also advised that he must file his appeal within five days from the receipt of the letter, that a simple statement of his desire to appeal would suffice, and that the local union would take no action on the expulsion until after he had been given full opportunity to present his appeal. At the request of Morgan's attorney the union later granted a week's extension and advised him that a special meeting of the district council had been called for August 26 to hear the appeal, and a transcript of the proceedings at the executive board meeting was also furnished to counsel. Upon receipt of this information counsel addressed a letter to the union, advising it that his client had decided not to appeal within the union but to resort to the courts for relief, because, as he believed, the executive committee had been without jurisdiction to try the case. Shortly after abandoning his appeal and just before this complaint was filed in the Superior Court, Morgan signed a written statement addressed to the officers of local 1150, advising them that he hereby "Rescinds his membership application and agreement and Resigns from local 1150 UE and Requests the Return of initiation fee and dues paid by him," and he assigned as reasons for his action that his "application for membership *** was secured by fraud and misrepresentation" in that he had been "informed that the UE was a labor organization and was to represent [him] in negotiations *** as to hours of labor, wages and conditions of employment," whereas the union was in fact "a New Deal, partisan, political organization *** and is a propaganda machine for

communism."

The law with respect to the jurisdiction of the courts in matters involving a voluntary association's enforcement of its own laws, especially where a member has not exhausted his rights of appeal within the association, presents no serious difficulty. The rule is well settled that where a voluntary association, after notice, tries a member for misconduct, finds him guilty and imposes a sentence within its power, courts will not interfere unless and until the member has exhausted his rights of appeal within the association. This principle has governed the relations of voluntary associations in Illinois for many years. In maintaining internal discipline to assure the accomplishment of their purposes, trade associations, churches, religious societies, lodges and labor unions frequently make decisions which are subject to orderly review in accordance with their constitutions, and it is only after the member has exhausted his rights to secure a review or where the right is inadequate, or the association is shown to have acted in excess of its jurisdiction, that the courts will interfere. The rule is well stated by the Supreme Court in the leading case of Engel v. Walsh, 258 Ill. 98, as follows: "The courts have frequently been called upon to restrain voluntary associations, such as churches, lodges of various kinds, boards of trade, and the like from expelling members for an alleged violation of some rule or regulation of the association, and in such cases this court has uniformly refused to sanction the practice of calling on a court of equity to adjust disputes arising between such associations and its members ***. In churches, lodges, labor unions, and other like voluntary associations, each person on becoming a member, either by express stipulation or by implication, agrees to abide by all rules and regulations adopted by the organization. (Bostedo v. Board of Trade, 227 Ill. 90.) Courts will not interfere to control the enforce-

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ment of by-laws of such associations, but they will be left free to enforce their own rules and regulations by such means and with such penalties as they may see proper to adopt for their government. *** If there is a by-law permitting plaintiff in error to appeal to some reviewing body from the decision of the executive board, clearly he would have no standing, in any event, in a court of equity until he had exhausted the remedies provided by his association for the redress of his supposed grievance." Similar enunciations of the rule are found in People ex rel. Keefe v. Women's Catholic Order of Foresters, 162 Ill. 78, Board of Trade v. Nelson, 162 Ill. 431, Attig v. International Brotherhood of Teamsters, 231 Iowa 1, 300 N. W. 636, Snay v. Lovely, 276 Mass. 159, 176 N. E. 791, and Lafond v. Deems, 81 N. Y. 507. The only limitations upon the rule, as set forth in the Keefe case, are instances where the association is not acting within the scope of its powers "so far as to have jurisdiction over the member charged with an offense and over the offense with which he is charged." Under such circumstances the expelled member is not under obligation to seek the remedy by appeal afforded by the laws of the society, and as the court said: "In other words, the proceeding for expulsion must be in accordance with the constitution and by-laws of the society, to the extent that the member expelled shall have notice, and shall be tried upon a charge within the jurisdiction of the tribunal trying him." (Italics ours.) We think that the requirements of the UE constitution as to presentation of the charges, trial and other requisites were amply fulfilled in the case at bar. Morgan's counsel argues that there were some irregularities in the notice, that the charges were not presented to him by the corresponding-secretary, that the manner in which the charges were prepared indicated a prejudging of the case before trial, and that he was deprived of counsel at the hearing. With respect to this conten-

tion, the following observation of the court in Green v. Board of Trade, 174 Ill. 585, is precisely applicable: "When it is considered that, as a rule, the body of the board of directors is composed of men not conversant with forms of procedure and technical rules of law, but are organized into a corporation or association for business purposes, and the governing body before whom trials are to be had is circumscribed by no technical rules of law, and that the purpose is to investigate whether there has been a violation of the rules of that body, - rules with which they, as well as the accused, are familiar, - it will be seen the employment of professional counsel would not be calculated to expedite business or advance the interest of the accused, because the judges are unacquainted with technical rules of law."

As a basis for invoking equitable relief, plaintiff relies on the rule that membership in a labor union is a valuable property right which merits protection. There is abundant authority to sustain this contention. Courts in Illinois and other jurisdictions have repeatedly held that the right to labor is property, and that since membership in a union is frequently incidental thereto, equity will assume jurisdiction to protect such rights. Ritchie v. People, 155 Ill. 98, Mathews v. People, 202 Ill. 389, Barbrick v. Huddell, 245 Mass. 428, 139 N. E. 629, Fleming v. Motion Picture Operators (New Jersey Eq.), 1 Atl.

(2d) 850. As a sequitur to this proposition plaintiff argues that the constitution and by-laws of a union constitute a contract between the union and its members which governs their rights and duties in relation to the union and between themselves, with reference to all matters affecting its internal management, and that the conduct of union affairs is measured by the terms thereof, citing as authority for the rule 5 C. J. 1341, sec. 26, and 16 R. C. L. 422, and cases cited therein; and it is urged on his behalf, as the principal ground for affirmance of the decree,

that since "there were no laws in Local 1150 under which the Local or any member could proceed against Morgan on June 16, June 27 and June 29, 1944," the union had no jurisdiction to conduct a trial described in the by-laws which had previously been adopted but not approved, and to expel him from the union. It should be noted, however, that like many newly formed organizations, the local actually functioned for the first few years after its organization without any written constitution, and transacted considerable business during that period. It functioned as the employees' bargaining representative at a number of plants, entered into contracts with various employers on behalf of its members, and elected the officers provided for in the national constitution. Under the national constitution, locals are permitted to "add other officers" to those enumerated therein, and by virtue of this provision local 1150 customarily elected or appointed certain additional officers, such as shop stewards, not provided for in the national constitution. Morgan held such a position, was a member of the grievance committee, and had at one time been a candidate for another office. For a considerable period of time the local members also elected an executive board composed of either one or two representatives from each shop, depending upon the number of union members there employed. Then, in March 1944, after notice by publication in the union newspaper, members of the local adopted a written constitution and by-laws which provided for an executive board to be constituted in the same manner as under the earlier unwritten rules, and among the functions which the local constitution vested in that board was the trial of members charged with offenses against the union. A copy of this constitution was sent to the national office for approval May 12, 1944, but was not finally approved for several months thereafter. Plaintiff's counsel argues that pending this approval, there were no laws under which the local

or any member could proceed against Morgan, and therefore the union had no jurisdiction to try and discipline him. However, whether or not the constitution adopted by the local had the official status of by-laws approved by the national union, it embodied the decision of the membership as to how an offending member should be tried, and aside from the question whether the local by-laws were effective pending their approval by the national body, the union certainly had the inherent power, as any voluntary association has, to adopt a method of procedure for the trial and punishment of its members, provided, of course, that the procedure adopted was not in conflict with the letter or spirit of the constitution of the parent organization and was in conformity with standards usually afforded for a fair trial. The UE constitution prescribed the essential requirements of such a trial, namely that the nature of the offense be presented in writing to the union and the member charged, that he be notified of the hearing and his right to appear at same, and his right of appeal from any adverse decision. The machinery set up by the local union for Morgan's trial fully conformed to these requirements, and by appearing before the executive committee, which was designated as the tribunal to conduct the hearing and give him an opportunity to participate in the trial, he subjected himself to the jurisdiction of the union just as effectively as any litigant does who appears in court when summoned as a party and undertakes to defend himself against charges with which he is fully conversant, after due notice. Having thus been afforded a fair trial within the requirements of the national constitution and having subjected himself to the jurisdiction of the executive committee, which he again recognized when he asked for additional time within which to prosecute his appeal, and

or any member could be a member of the union, but the union had no jurisdiction to try him or punish him. However, whether or not the constitution adopted by the local union, its official status of by-laws approved by the national union, it embodied the decision of the membership as to no one offending member should be tried, and aside from the question whether the local by-laws were effective pending their approval by the national body, the union certainly had the inherent power, as any voluntary association has, to adopt a method of procedure for the trial and punishment of its members, provided, of course, that the procedure adopted was not in conflict with the letter or spirit of the constitution of the parent organization and was in conformity with standards uniformly applied for a fair trial. The 1911 constitution provided the essential requirements of such a trial, namely that the nature of the offense be presented in writing to the union and the member charged, that he be notified of the hearing and his right to appear in person, and his right of appeal from any adverse decision. The majority set up by the local union for Morgan's trial fully conformed to these requirements, and by appearing before the executive committee, which was designated as the tribunal to conduct the hearing, and give him an opportunity to participate in the trial, he subjected himself to the jurisdiction of the union just as effectively as any litigant does who appears in court when summoned as a party and undertakes to defend himself against charges with which he is fully conversant, either by notice, having thus been afforded a fair trial within the requirements of the national constitution and having subjected himself to the jurisdiction of the executive committee, which he again recognized when he asked for additional time within which to prosecute his appeal, and

obtained a transcript of the proceedings, he cannot now contend that the union had no jurisdiction because its duly adopted by-laws had not been approved; the contention is a pure afterthought, and he should not now be heard to rely on the jurisdictional question which was never seriously urged until he presented his briefs on appeal in this court. In Engel v. Walsh the court pointed out that on becoming a member each person "agrees to abide by all rules and regulations adopted by the organization," and that "courts will not interfere to control the enforcement of by-laws of such association, but they will be left free to enforce their own rules and regulations by such means and with such penalties as they may see proper to adopt for their government." (Italics ours.) But plaintiff's counsel goes so far as to contend that Morgan's trial did not even conform to the provisions of the national constitution. He says there were no charges in writing, that a copy of the charges was not given to plaintiff by the recording secretary as the national constitution provides, and that notice as to the date of the trial was misleading. The record does not bear out these contentions. It clearly appears that a copy of the typewritten charges was handed to Morgan on June 20, a week before the trial. He had ample notice, was apprised of the nature of the charges, and in fact appeared at the hearing. His counsel further argues that these charges did not comply with the UE's constitutional requirement that they be in writing because they were not signed, and that since the constitution speaks of "plaintiff" and "defendant," such language must be construed to require a "complaint" as it is understood in law, signed by a plaintiff. A short and simple answer to these contentions is contained in Yeomans v. Union League Club of Chicago, 225 Ill. App. 234, which also involved the expulsion of one of its members by the club, and a petition to compel his reinstatement to membership. Plaintiff in that case likewise contended that he was

not properly tried under the by-laws, for various technical reasons, but Mr. Justice O'Connor, speaking for the court, said that the law does not require technical accuracy to be observed in a trial for expulsion of a member from a voluntary association, and that such matters of procedure will not be reviewed by a court.

It is significant that the jurisdictional question, now so strongly urged by plaintiff in support of the decree, was an incidental issue upon trial of the cause. The complaint refers to it only in the vaguest terms. The predominant theme of the complaint is that the C. I. O., with which UE is affiliated, and some of its officers, members and agents, including the defendants, conspired among themselves and attempted, through plaintiff and other members of local 1150, in violation of the laws of UE, to circulate "political propaganda for the New Deal, masquerading under the name of the Democratic Party and also for the fourth term for Franklin Delano Roosevelt as President of the United States and also in favor of organizing the members of Local 1150 into an active political arm of the aforesaid New Deal's political organization, and also in favor of communism and various communistic individuals, organizations, plans and proposals, with all of which propaganda and the circulating of the same Plaintiff was not in accord and recognized no obligation to agree as an independent American citizen who had surrendered no political or civil rights in joining the UE; which propaganda Plaintiff refused to circulate ***; [and] that because he refused to co-operate with and collaborate in the aforesaid political and communistic activities, the said defendants and others whose names are not now known to Plaintiff, conspired together to injure and defame him, to tear down and smear his good name and reputation, and to bring about his expulsion from said Local 1150." The learned chancellor who tried

the cause was evidently of the opinion that the foregoing subject matter constituted the real issue in the cause, for in two written opinions rendered in the course of the litigation, one upon defendants' motion to strike the complaint for ~~in~~ insufficiency, and the other upon conclusion of the hearing, he stated that "the main question here is whether a union can compel a member who holds a contrary belief, to actively take part in the union political campaign, or suffer expulsion if he refuses," and "I choose *** to pass on to what seems to me to be the fundamental and controlling issue. Was Morgan put out of the Union because of his opposition to the political activities of the Union officials?" He concluded his findings with the following observation: "I believe that the result of the trial was a foregone conclusion. Plaintiff was on his way out. I also believe that appeal to any higher C. I. O. tribunal at that time would have been a useless gesture." It is evident that the jurisdictional question, which plaintiff now urges, was either not presented and argued, or that the chancellor disregarded it in arriving at his decision. Of course, many of the charges lodged against Morgan, some ten or twelve in number, which were abundantly sustained by the evidence, related to matters entirely foreign to the question of politics, but these were evidently overlooked or disregarded upon trial of the cause. With respect to the comment that an appeal by Morgan would have been "a useless gesture," we quote the following excerpt from Green v. Board of Trade as expressive of the settled rule in this state: "The fact that the charges are preferred by a member of the board of directors which is to try the accused would not be cause for interference by a court of equity to prevent a trial. To assume in advance that such a board would not give a member a fair trial is to deny to such a body the reputation for justice and fair dealing which commercial and mercantile associations have always

the cause was established by the opinion of the majority, and
that matter constituted the whole of the case, and in the
written opinions rendered in the course of the litigation, one
upon defendant's motion to strike the complaint for immateriality
and the other upon consideration of the merits, he stated that "the
main question here is whether a union can properly be formed who
holds a contrary belief, to actively take part in the union
political campaign, or suffer exclusion is to be refused," and "it
chooses to pass on to itself as to be the fundamental
and controlling factor, and to determine out of the union
of its opposition to the political activities of the union
officials." He concluded his findings with the following ob-
servations: "I believe that the union of the United States
some consideration, and that the union of the United States
that agreed to any other U. S. law, and that the union
have been a national center." "It is not the union of the
national center, which is not a union, and it is not a
center and argues, on the other hand, that the union of the
union of the United States, and that the union of the United States
against foreign, some on the other hand, and that the union of the
union of the United States, and that the union of the United States
foreign to the question of politics, but that the union of the
overlooked or disregarded the fact of the union, and that the
to the comment that an appeal to the union of the United States
less feature," we quote the following passage from the opinion of the
of this as expressive of the settled rule in this matter: "It is
fact that the charges are preferred by a union of the United States
directors which is to try the accused only on the basis of
interference by a union of the United States, and that the union of the
in advance that such a board would not give a proper trial
is to deny to such a body the reputation for justice and fair
dealing which Congress and the people have always

enjoyed. It is to assume that men will not deal fairly with one of themselves. Such presumption cannot be entertained."

Defendants argue that in submitting his resignation after the expulsion trial, Morgan abandoned whatever rights remained to him as a member, and therefore the court was without jurisdiction to grant him relief. Although the decree finds that plaintiff attempted to "rescind" his membership contract with local 1150, it does not recognize the document which Morgan presented to the union after his expulsion as a resignation, and holds that the membership contract between him and the local was not affected by said "rescission." Within the language of that document Morgan not only rescinded his membership and requested "the Return of initiation fees and dues paid by him," but his resignation from the union was as effective as the English language could possibly make it. However, defendants have specifically limited their notice of appeal to that part of the decree which declared his expulsion from the union to have been wrongfully brought about and therefore "null and void."

After a careful examination of the record we are convinced that Morgan had a fair trial under methods of procedure set up by the local union and in conformance with the constitution of the parent body, and having submitted himself to the committee of the union designated for conducting the hearing, and not having exhausted his remedies by appeal to the national organization, he is precluded from invoking the jurisdiction of a court of chancery to set aside the expulsion order and to order his reinstatement. Therefore the decree of the Superior Court is reversed and the cause is remanded with directions that the complaint be dismissed for want of equity.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

43610

ALICE CAMPO,

Appellant,

v.

REUEL H. GRUNEWALD et al.,

Appellees.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, Alice Campo, appeals from an order of the Superior Court dismissing her complaint, consisting of two counts, against Reuel H. Grunewald, Frank O. Koepke, Peter J. Schumacher and Morton D. Freed. The first count is an action at law in which plaintiff charges that, pursuant to a conspiracy formed by defendants, she was deprived of the rents and income of a certain parcel of real estate, in which she claims to be the owner of an undivided one-half interest, and was damaged to the extent of \$5400, as follows: \$1950 as her share of the rents, \$750 fees for services rendered by her attorney in vacating a certain foreclosure decree affecting the property, and \$2700 punitive damages. In the second count, which is an action in equity, she alleges that she and Morton D. Freed became owners of certain real estate as tenants in common upon the death of Alfred R. Freed, by reason of facts set forth at length in count one, and that while it appears defendants have become the legal owners of the real estate in question, nevertheless, as the result of the fraud alleged in the first count, one of the defendants became a constructive trustee, holding the legal title to one-half of the real estate in trust for her; and she prays that certain conveyances, including a certificate of purchase issued in a foreclosure suit, be set aside and vacated, that title vest in her, and that partition be awarded. A motion to dismiss was made as to both count one at law and count two in equity. The court sustained the motion to strike count one because the matters

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THE COURT OF CHANCERY
 IN THE MATTER OF

THE TRUSTS OF THE WILL OF

THE PLAINTIFF, ALICE, vs. THE DEFENDANT, JOHN

ORDER OF THE COURT OF CHANCERY, MADE ON THE 12TH DAY OF

APRIL, 1900, IN THE MATTER OF THE TRUSTS OF THE WILL OF

ALICE, DECEASED, AND IN THE MATTER OF THE TRUSTS OF THE WILL OF

JOHN, DECEASED, AND IN THE MATTER OF THE TRUSTS OF THE WILL OF

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therein alleged were held to be cognizable only in equity, and because it appeared that plaintiff and some of the defendants were co-tenants and that an action for rents by one co-tenant could not be maintained at law against another. The motion to strike count two was sustained because it appeared that certain of the material allegations were dependent upon the result of a foreclosure suit then pending in the Circuit Court of Cook County. Plaintiff having elected to abide by the complaint and each count thereof, the court adjudged and decreed that the suit be dismissed at her costs. She thereupon prosecuted a direct appeal to the Supreme Court upon the theory that a freehold was involved, but the court held adversely to her claim, and accordingly transferred the cause here for determination. Campo v. Grunewald, 391 Ill. 91.

Count one of the complaint embraces 25 printed pages of the abstract. The salient portions thereof allege that plaintiff's father, Albert R. Freed, acquired title in fee simple to the real estate in question in 1928 and remained the owner thereof until the time of his death on January 4, 1938; that he died intestate, leaving Morton D. Freed, his son, Fannie Freed, his wife, and plaintiff as the only heirs at law; that January 25, 1938 there was filed of record in the office of the recorder of deeds of Cook County a purported deed of the real estate, dated December 14, 1936, from Albert R. Freed, to his son Morton as grantee; that the signature of Albert R. Freed, the supposed grantor, had been forged; that Morton entered into a conspiracy with other persons about the time of his father's death to defraud and swindle plaintiff out of her interests in the real estate and the rents and income therefrom by drawing a purported deed of conveyance to the property from Albert R. Freed to himself as grantee, forging his father's name, and filing

the same of record, and that the forged deed, which was filed of record on January 25, 1938, was drawn, forged and recorded pursuant to a conspiracy between Morton D. Freed and other defendants; that prior to the time Alfred R. Freed acquired title to the real estate in March 1928 there had been filed of record in the office of the recorder of deeds a purported first mortgage trust deed on the real estate in question executed by a former owner thereof on May 21, 1926, which contained a recital that it was executed to secure the payment of a note for \$3500 due five years thereafter, and also ten interest notes or coupons; that nothing was ever lent or advanced on account of said instruments, and that Alfred R. Freed purchased and acquired the possession of all the papers from the holder thereof shortly after he acquired title to the real estate, and retained possession thereof until the time of his death; that Morton was appointed administrator of his father's estate; that he did not inventory either the real estate or the purported notes and trust deed as assets of the estate of the decedent; that certain claims were allowed against the estate; that Morton filed a sworn statement in the Probate Court in which he asserted that there were no assets with which to pay the claims of creditors, and procured his discharge without paying anything to the creditors.

It is further alleged that about September 4, 1941 the defendants, Grunewald, Koepke and Schumacher, knowing that the purported conveyance filed of record January 25, 1938, was a forgery, together with other persons, joined with Morton in the conspiracy formed in 1938, and "willfully, maliciously, corruptly and fraudulently, combined, conspired, confederated and agreed together to defraud and swindle" plaintiff out of her rights and interests in said property and the rents and income therefrom "by uttering

[illegible]

said forged deed as genuine, and having said Morton D. Freed execute a purported deed of conveyance of said real estate" to Schumacher, which would purport to vest in him the complete legal title thereto; and to deliver to Koepke the purported principal promissory note for \$3500 and interest coupons, together with a trust deed, and then to have Koepke, as the owner "of said fictitious and void trust deed and notes," institute a fraudulent and collusive proceeding against Schumacher for the foreclosure thereof, and to join plaintiff as a codefendant thereto, and to file a false affidavit of nonresidence, giving a nonexistent address as the last known place of residence of plaintiff, thereby conferring a colorable jurisdiction upon the court and preventing plaintiff from learning that the proceeding had been instituted, and thereby obtaining a decree by which the "said fictitious first mortgage trust deed would be foreclosed, and said real estate would be ordered sold to satisfy said pretended indebtedness," and plaintiff thereby be barred from all rights in the real estate and "defrauded and swindled out of her interest therein."

It is further alleged that on November 24, 1942, pursuant to said conspiracy, a foreclosure was entered in the collusive proceeding, finding that Koepke had a valid and subsisting lien on the real estate for the sum of \$4675.99 and costs, and providing that unless that sum was paid the real estate would be sold; that on December 23, 1942 a special commissioner appointed by the court, sold the property to Koepke for the sum of \$4866.50; that a certificate of sale issued to Koepke, and a duplicate thereof was filed in the office of the recorder of deeds.

Count one of plaintiff's complaint further alleges that

she was never served with summons, never had any notice or information whatsoever that said proceeding had been instituted prior to January 10, 1944; that on February 16, 1944 she filed a verified petition in that proceeding in the Circuit Court alleging that the purported notes and trust deed of which Koepke claimed to be the owner, were null and void because nothing was ever lent thereon; that Albert R. Freed purchased and acquired the principal note, interest coupons and trust deed in the year 1928, and retained them until the time of his death; that any right of action thereon was barred by the Statute of Limitations; and she averred in her petition that her last known place of residence as stated in the affidavit of nonresidence, was nonexistent, and asked that the decree entered on November 24, 1942, be vacated, and that she be granted leave to appear and defend; that on March 16, 1944 Judge Fisher of the Circuit Court entered an order vacating the decree and giving her leave to file an answer to Koepke's complaint within a time fixed by the court; that she filed such an answer, averring that the purported notes and trust deed were null and void and fraudulent for the reasons heretofore stated, and also that the proceeding was fictitious, fraudulent and collusive as between Koepke and Schumacher; that Koepke had procured and caused the purported conveyance to be made to Schumacher in order that the latter might collect the rents from the real estate for and on behalf of Koepke, and in order that Koepke might bring a collusive and fictitious proceeding based on the notes and trust deed against Schumacher as the ostensible owner of said real estate, and thereby procure said real estate to be sold, and thus defraud plaintiff out of her interest therein.

It is further alleged in count one that on May 24, 1943 suit was instituted in the Circuit Court, entitled People v. Schumacher, No. 43-C-5604, in which Schumacher was the sole defendant; that the suit was instituted to foreclose taxes for the years 1932-1940

she was never served with summons, never has any notice or information whatsoever been received by her, and she filed prior to January 10, 1944, that on February 15, 1944, she filed a verified petition in the Circuit Court of the State of Illinois, alleging that the purported notes and trust deed of which Josephine was the owner, were null and void because nothing was ever lent thereon; that about 1944, these purchases and acquisitions of the principal notes, interest coupons and trust deed in the year 1923, and retained them until the time of his death; that any right of action thereon was barred by the statute of limitations; and she averred in her petition that her last known place of residence as stated in the affidavit of nonresidence, was nonexistent, and asked that the docket entered on November 1, 1944, be vacated, and that she be granted leave to appear and answer; that on March 10, 1944 Judge Fisher of the Circuit Court entered an order vacating the docket and giving her leave to file an answer to Josephine's complaint within a time fixed by the court; that she filed such an answer, averring that the purported notes and trust deed were null and void and insufficient for the reasons hereinbefore stated, and also that the proceeding was fraudulent, fraudulent and collusive as between Josephine and Schumacher; that Josephine had procured and caused the purported conveyances to be made to Schumacher in order that the latter might collect the rents from the real estate for and on behalf of Josephine, and in order that Josephine might bring a collusive and fraudulent proceeding based on the notes and trust deed against Schumacher as the ostensible owner of said real estate, and thereby procure said real estate to be sold, and thus defraud plaintiff out of her interest therein.

It is further alleged in count one that on May 14, 1943 said was instituted in the Circuit Court, entitled Josephine v. Schumacher No. 43-C-5604, in which Schumacher was the sole defendant; that the

which had been assessed against the real estate and were unpaid; that Grunewald appeared for Schumacher in that proceeding as his attorney, and on his behalf filed a report of sale on January 31, 1944, in which it was recited that the real estate had been sold to one M. L. Carse for the sum of \$600; that Carse was employed by Grunewald as his secretary, and purchased said real estate at the sale upon Grunewald's direction.

It is further alleged that in order to procure the purported decree rendered in the Circuit Court in the case of Koepke v. Schumacher to be vacated, she was compelled to and did employ counsel, and that the fair and reasonable value of the services rendered by him in that behalf was \$750. As a basis for punitive damages, the complaint further alleges that the actions and conduct of the defendants were willfully, maliciously, intentionally and fraudulently committed, and that malice was the gist of her cause of action against them. As heretofore stated, the court sustained the motion to strike count one because the matters therein alleged were held to be cognizable only in equity, and because it appeared that plaintiff and some of the defendants were co-tenants, and that an action for rents by one co-tenant could not be maintained at law against another. Count one is predicated upon allegations that the purported conveyance from Albert R. Freed to his son was a forgery, and that all that followed was done in pursuance of a conspiracy entered into by some of the defendants and joined by others at a later date. A forged deed is an absolute nullity, and nothing is conveyed thereby. 18 C. J. Deeds, sec. 176, n. 82, (p. 242); 26 C.J.S. Deeds, sec. 68, n. 73 (p. 308). Therefore, the allegations of count one were sufficient to set forth a good cause of action, and if some of the subject matter was cognizable only in equity, the court could, under paragraph 168 (sec. 44 (2)) of the Practice Act (Ill. Rev. Stat. 1945, ch. 110), have transferred

the cause to the equity side of the court. With respect to the contention that plaintiff and some of the defendants were co-tenants and that an action for rents by one co-tenant cannot be maintained at law against another, the rule is well established that an action at law will lie where the account is not complicated and involved. Webster v. Hall, 388 Ill. 401; County of Cook v. Davis, 143 Ill. 151; Calumet National Bank v. Friendship Building & Loan Association, 250 Ill. App. 322; Central Iron and Metal Co. v. Krug, 189 Ill. App. 44. In the proceeding here under consideration, if plaintiff should be entitled to a share of the rents, the amount thereof can readily be ascertained by simple computation.

In the equity count plaintiff alleged that she and Morton D. Freed became owners of the property as tenants in common upon the death of their father, Albert R. Freed, and that while it appears defendants have become the legal owners of the real estate involved, as the result of the fraud alleged in the first count, Koepke became a constructive trustee holding the legal title to one-half of the real estate in trust for her, and she prayed that the various conveyances, including a certificate of purchase issued in the foreclosure suit, be set aside and vacated, that title be vested in her, and that a decree of partition be entered. Most of the allegations heretofore set forth as appearing in count one, were incorporated in count two by reference. The court sustained defendants' motion to strike count two because it appeared that certain of the allegations were dependent upon the result of the foreclosure suit then pending in the Circuit Court. That suit was ultimately dismissed by direction of the Supreme Court in a mandamus proceeding in an opinion filed September 18, 1946, People ex rel. Alice Campo v. David F. Matchett et al., 394 Ill. 464. Chronologically, that proceeding took the following course.

After Judge Fisher had allowed plaintiff's petition to vacate the foreclosure decree, the first division of the Appellate Court in Koepke v. Schumacher, 324 Ill. App. 315, reversed the order of the chancellor. Thereupon, leave was had to appeal to the Supreme Court, and in Koepke v. Campo, 391 Ill. 355, the cause was remanded to the Appellate Court with directions to dismiss the appeal. Thereafter, in another opinion, Koepke v. Schumacher, 328 Ill. App. 113, the first division failed to comply with the mandate of the Supreme Court, and plaintiff brought a mandamus proceeding in the Supreme Court against Judges David F. Matchett et al., which, as heretofore stated, resulted in an order directing the dismissal of Koepke's appeal. That finally disposed of the foreclosure proceeding and eliminated the principal ground urged by defendants and adopted by the court for sustaining defendants' motion to strike count two of the complaint. A considerable portion of defendants' briefs in this proceeding, and the supporting argument, are predicated upon the pendency of the foreclosure suit. Since that suit has now been disposed of, we think the allegations of count two are sufficient to sustain a cause of action.

As a co-tenant plaintiff seeks an accounting of the rents from the property; she also asks for attorneys' fees for services rendered in procuring a decree of foreclosure to be vacated and set aside, as well as punitive damages. We do not pass upon her right to be reimbursed for the services rendered by her attorney or punitive damages. No cases are cited in support thereof. However, that will be a matter for the trial court to determine when the case is ultimately heard.

For the reasons indicated, the order of the Superior Court dismissing counts one and two of the complaint is reversed, and the cause is remanded with directions that defendants be required

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to answer the allegations of the complaint, and for such further proceedings as may be necessary and proper.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

1. The first part of the paper is devoted to a general discussion of the problem.

2. In the second part, we consider the case of a single variable.

3. The third part is devoted to the case of several variables.

4. In the fourth part, we consider the case of a function of several variables.

5. The fifth part is devoted to the case of a function of several variables.

6. In the sixth part, we consider the case of a function of several variables.

7. The seventh part is devoted to the case of a function of several variables.

8. In the eighth part, we consider the case of a function of several variables.

9. The ninth part is devoted to the case of a function of several variables.

10. In the tenth part, we consider the case of a function of several variables.

11. The eleventh part is devoted to the case of a function of several variables.

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25. The twenty-fifth part is devoted to the case of a function of several variables.

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27. The twenty-seventh part is devoted to the case of a function of several variables.

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29. The twenty-ninth part is devoted to the case of a function of several variables.

30. In the thirtieth part, we consider the case of a function of several variables.

43778

DAVID J. ROSS COMPANY, a
Michigan corporation,

Appellee,

v.

ELLIOTT BLUMBERG, ISAAC BLUMBERG,
HAROLD BLUMBERG, individually and
doing business as Adams Machinery
Company, a co-partnership,
Appellants.

331 I.A. 22

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

David J. Ross Company, a Michigan corporation, brought suit against the Adams Machinery Company, a co-partnership consisting of Elliott, Isaac and Harold Blumberg, to recover the purchase price of a Pratt and Whitney Surface Grinder, sold to plaintiff by defendants as a "Rebuilt and Guaranteed" machine, which was alleged by plaintiff to have been defective and unsuited for "any use whatever." Pursuant to trial the court found the issues in favor of plaintiff, entered judgment against defendants in the sum of \$3750, which was the purchase price of the machine, and made a special finding that plaintiff had rescinded its purchase, and offered to return the machine to defendants within a reasonable time. Defendants appeal.

It appears that in 1942 plaintiff was engaged in the manufacture of a precision vise in Benton Harbor, Michigan. Defendants had been in the business of buying, selling and rebuilding machine tools for many years, with offices and salesrooms in Chicago and a warehouse and plant in Lincolnwood, Illinois, where many machinists were employed. On July 30, 1942 David J. Ross, president of plaintiff company, and Edward L. Rousselle, its plant superintendent, came to Chicago in search of a grinding machine. In the late afternoon of that day they saw a Pratt and Whitney grinding machine in the show window of defendants' salesroom, and the following morning they returned to see if it was

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DAVID L. ROSE COMPANY, INC.
Chicago, Illinois

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DAVID L. ROSE COMPANY, INC.

what they wanted. Negotiations were carried on with Elliott Blumberg (hereinafter referred to as Blumberg), one of the defendants. According to both Ross and Rousselle, they told Blumberg they wanted a machine to grind a 13-inch surface on a vise which they were manufacturing, and Blumberg told them that "this is the machine that will do it." Rousselle testified that at that time the machine was equipped with a 14-inch wheel. After some discussion the price was fixed at \$3750, and Ross returned to Benton Harbor in order to send his check, order and allocation classification, without which defendants would not ship the machine. The machine was delivered August 2, although defendants' invoice was dated August 11, 1942.

When the grinder arrived at plaintiff's plant in Benton Harbor on August 2 it was equipped with a 14-inch wheel, mounted, and in the cabinet at the base of the machine were four wheels, two of 12-inch dimensions and two of 14-inch dimensions. Rousselle then installed and prepared the machine, hooked it up to a 7-1/2 horsepower motor, which Blumberg had told them would suffice, and ran it under power with the 14-inch wheel which was attached to the machine when delivered. The grinder vibrated and shook, and Rousselle testified that upon inspection he found the drive wheel, which had been welded, off balance, the spindle and idler bearings and spindle bushings worn, and the magnetic chuck burned out. Some five or six days later Ross telephoned Blumberg at Chicago, telling him that the machine had failed to operate properly, and Herman Deisler, a repairman, was sent out to inspect it. After Deisler consulted with the Chicago office, the machine was sent back for repairs to defendants' plant, where it was found that the machine bed was .015 inches out of line. About ten days later Ross was called to Chicago to inspect the machine, as repaired. It was found that some work remained to be done. Ross returned to Benton

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five or six days later Ross telephoned Blumberg at Chicago, telling
him that the machine had failed to operate properly, and Herman
Deiler, a repairman, was sent out to inspect it. After Deiler
consulted with the Chicago office, the machine was sent back for
repairs to the machine's plant, where it was found that the machine
had been 0.15 inches out of line. About ten days later Ross was
called to Chicago to inspect the machine, as repaired. It was
found that some work remained to be done. Ross returned to Benton

Harbor, and the machine, purportedly repaired, was shipped back to plaintiff a day or two later. It appears that when the grinder failed to run properly when first delivered, Rousselle had written to Pratt and Whitney for instructions, and had learned that a 7-1/2 horsepower motor, as represented, was not large enough. Therefore, when the machine was delivered the second time on August 23, Rousselle ordered a 15 horsepower motor, which did not arrive at plaintiff's plant until the end of September. In the interim the machine was not in use, but when the new motor arrived, the machine was hooked up to it, and when set in operation the guard mount broke and the wheel flew into pieces, one of which struck Rousselle over the eye, injuring him. After a lapse of several days, Ross called Blumberg, told him what had happened, and asked him to take the machine back. He fixed that conversation at about October 1, stating that "I explained at great length what had happened, that we had done everything we could ~~xxx~~ to make the machine work and a man had been injured the night before and could have been killed and in those conditions the machine would not do the grinding job, it was too dangerous to operate and I wanted him to take it back. First he said, no, and then he said he would take it up with his father, and call me the next day and tell me under what conditions they would take the machine back. I didn't ever hear from him again."

Defendants contend that the machine was equipped with a 12-inch wheel only, and that plaintiff must have known that it would not grind a 13-inch surface. However, both Ross and Rousselle testified that when they first talked to Blumberg, they told him they needed a machine that would grind a 13-inch vise and that Blumberg said "this is the machine that will do it," and plaintiff introduced in evidence five exhibits showing that when the machine was originally delivered it was equipped

Harbor, and the machine, purposefully to show, was taken back to plaintiff's bay on two later. It appeared that the machine failed to run properly when first delivered, Tonnelle had written to West and inquiry for instructions, and had to send back a "V" message, and a representative was not large enough. Therefore, with the machine was delivered the second time on August 11, Tonnelle delivered a "V" message, which did not arrive at plaintiff's office until the end of September. In the end the machine was not in use, but when the new motor arrived, the machine was looked up to it, and when set in operation the same went wrong and the wheel flew into pieces, one of which struck Tonnelle over the eye, inflicting him. After a lapse of several days, Tonnelle then bore, told him that had happened, and went on to state the machine back. He stated that on September 11, 1907, October 1, stating that "I explained at great length what had happened, that we had some overhauling; we could not make the machine work and a man had been injured the night before and would have been killed and in those conditions the machine could not be grinding too, it was too bad, none to operate and I wanted him to take it back. That he said, no, he then said he would take it up with his father, and call on the next day and tell me under what conditions they would take the machine back. I didn't ever hear from him again."

Defendants contend that the machine was equipped with a 12-inch wheel only, and that plaintiff must have known that it would not grind a 14-inch surface. However, both Ross and Tonnelle testified that when they first talked to Blumberg, they told him they needed a machine that would grind a 14-inch size and that Blumberg said "this is the machine that will do it," and plaintiff introduced in evidence five exhibits showing that when the machine was originally delivered it was equipped

with both 12- and 14-inch wheels and adapter rings.

Rousselle's testimony as to the defective operation of the machine, when it was first delivered and also after it had purportedly been repaired, is illuminating. He was at the time employed as superintendent of the David J. Ross Company at its plant in Benton Harbor, and accompanied Ross when the machine was purchased. He described the installation of the grinder when it was first delivered at plaintiff's plant, and stated that it was equipped with four wheels, five plates and a magnetic chuck. "There were three plates for a 14 inch wheel, with wheels mounted on and 12 inch wheels. There were three plates, 14 inch grinding wheel mounted, and there were 2 plates, one with a 12 inch wheel mounted and one with nothing. A 14 inch wheel was on the machine. The other wheels were in the cabinet in the base of the machine." He stated that after connecting the machine with a 7-1/2 horsepower motor he proceeded to test its operation with the 14-inch wheel which was attached when the machine was delivered, and described the first operation as follows: "The machine started to vibrate and shake and it cut just on the front side of the plate. The machine operated on that occasion for about 3 minutes at a speed of 1100 on the spindle. *** Vibration continued until I shut it off. It started to vibrate the minute I started the machine up ***. After I shut the machine off, I took the wheel off, took the magnetic chuck off and I indicated the bed with the disk from the spindle. By indicating the bed, I mean I used the instrument to see that the spindle was true with the bed. It was not. The variation was fifty thousands between the point of about 11 inches. When I looked the machine over I found that the drive wheel had been broken and welded, off balance. I also found the spindle bearing was worn. I also found the idler bearing on the wheel in back was worn. Some mechanisms or parts

in the machine were visible to the eye, some parts I had to remove. *** I also found the slide bed worn, the slide that carries the wheel up and down; also the whole mechanism where the bed travels was worn and didn't operate at all, also the bed was out of alignment and the ways. The ways are what the bed travels back and forth on. The magnetic chuck had a burned out surface. The spindle bushings were worn. After I made the examination and found the conditions, I told Ross about it."

Rousselle stated that Deisler was advised of all these defects, and suggested that the machine be returned to defendants' plant for repair.

Rousselle testified that he next saw the machine about ten or twelve days later at defendants' shop. The machine superintendent told him that "We have not had much experience with grinders, but this one we tore down and we really rebuilt it." Rousselle then made an inspection of the grinder, and it was set in operation. "Then I started the bed up and the bed went back and forth twice and stopped. I said 'that is one of the things I like to have fixed' ***. When I inspected the machine I found that he had rebushed the idle wheel. The driver wheel on the top of the spindle, put the body level to maintain its balance. He also scraped the ways in for the slide that carries the wheel up and down, and in order to turn the machine up and down he had to put additional spokes on the wheel to get leverage up enough to move it up and down, and I told him the automatic would not function properly due to tightness; he did not answer that question. The machine was not fully put together on that occasion. They were still working on it, putting various pieces back. I don't recall just exactly what parts, it was not completely assembled. There were a few things he had to still put on. He said he had a few minor things to do and would be finished that afternoon and ship the next day. During that afternoon a grinding

wheel was not affixed to that machine at any time. There was no plate on the machine. The machine was turned on and stayed on for about 4 or 5 minutes. It didn't run good. The mechanism traveling, going back and forth didn't work, the bearing in back that he rebushed on the idler started to get worn and he drew my attention to it and told me I would have to watch that bearing close, keep it well greased. There was no grinding done on that machine on that occasion. The machine came back 2 or 3 days later."

After the grinder had been returned to plaintiff's plant, Rousselle had to wait some three weeks or a month until the 15 horsepower motor necessary for the grinder's operation, was delivered. He then installed the machine, connected it with the new motor, and when he turned on the power the wheel flew off and broke "a minute after the machine was started," and struck him in the eye.

It is first urged by defendants, as ground for reversal, that the trial court erred in the special finding that plaintiff rescinded the contract of purchase, and their counsel argue that an affirmative act by the party desiring to rescind is necessary and that notice of rescission must be clear, positive and unambiguous. The applicable rule is stated as follows in ch. 121-1/2, sec. 69(3), Ill. Rev. Stat. 1945: "Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer." Sec. 69(1) (d) provides that "Where there is a breach of warranty by the seller, the buyer may, at his election - Rescind the contract to sell or the sale and refuse to receive the goods,

or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid." An examination of the record leads to the conclusion that after the machine was repaired and returned, it still did not operate properly, and that Ross asked Blumberg to take it back. Upon this record, the trial judge having heard all the testimony, was justified in making a special finding that plaintiff had rescinded its purchase of the surface grinder and offered "to return it to defendants within a reasonable time after its redelivery" to plaintiff.

It is specifically urged by defendants that as a condition precedent to rescission, the purchaser must return or offer to return the property purchased within the time fixed by the guarantee. The guarantee in this case is embraced in plaintiff's written order which contains an express warranty guaranteeing the operation of the machine for 30 days, and defendants argue that plaintiff failed to prove a breach of that guarantee within that period. On the trial of the cause plaintiff offered oral testimony of a conversation between Ross, Rousselle and Blumberg at their first meeting, wherein Blumberg stated that the machine was capable of operating a 14-inch grinding wheel, and that it would grind accurately within a tolerance of plus or minus 1/1000 of an inch, and it is argued that the court erred in admitting this evidence as to oral warranties because it had the effect of varying the terms of the contract. However, plaintiff's action was not based upon a written agreement, the terms of which were sought to be varied by parole evidence. It should be noted that the writing consisted of plaintiff's order, which was predicated upon the conversation between Ross and Blumberg at defendants' showroom on July 31, 1942. Defendants' invoice bore date August 11, 1942 and was not sent out until more than a week after the machine had been delivered, tested, found to be defective, and

returned. Under these circumstances there is no merit to defendants' argument that the evidence of the conversation between Ross and Blumberg relating to the type of machine and its ability to do the work required, should not have been admitted by the trial court. Plaintiff here sued upon the express warranty made by Blumberg that the machine would grind a 13-inch surface, and the evidence justifies the conclusion that the machine was not suited for that purpose and would not do the work for which it was intended and purchased. In Federal Rubber Manufacturing Company v. Plow City Garage, 204 Ill. App. 126, defendant relied on the written contract of sale and contended that evidence of a prior warranty was not admissible, but the court held that "the rule that a written contract of sale avoids a prior verbal warranty has no application where the writing is only an order for the goods. 35 Cyc. 380. Therefore, appellant's contentions against the verbal warranty have no foundation. There was no proof to dispute the warranty nor its breach."

As a further ground for reversal it is urged that plaintiff failed to prove a breach of warranty within the 30-day period provided in the contract. There is no merit to this contention. The evidence clearly discloses that within five or six days from the date of shipment of the machine on August 1, 1942, plaintiff advised defendants that it did not work, and upon inspection by defendants it was returned for repair to defendants' shop. This breach of warranty undisputedly occurred within 30 days from the sale of the machine, and was recognized by defendants, who recalled the machine for repair. What occurred thereafter is of secondary importance, because defendants sought to restore the machine to working order and ultimately failed to do so. In view of this evidence the court was entirely justified in finding that plaintiff had rescinded the purchase and offered to return the machine within a reasonable time. Everything that happened after

plaintiff first notified defendants of the faulty operation of the machine was the result of the efforts of defendants to repair it, and these efforts clearly failed.

Plaintiff's counsel call our attention to the scarcity, at the time of this transaction, of machines, and they say that if this grinder had been in good operative condition, as defendants insist, they could have accepted the return of the machine and resold it without damage to either of the parties; nevertheless defendants refused to accept the return of the machine, although if it had been in satisfactory repair, it could probably have been readily resold. There is force to plaintiff's argument that because the machine was defective, and defendants were aware of it, they refused to accept it in return.

After a careful examination of the record and consideration of the several contentions made, we are satisfied that the trial court properly found for plaintiff, and the judgment of the Circuit Court is accordingly affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

43769

GAETONA COSTANZO,

Appellee,

v.

THOMAS J. FRIEL and
CHARLES C. RENSHAW, as
Trustees, etc., et al.,
doing business as CHICAGO
SURFACE LINES,

Appellants.

)
) APPEAL FROM SUPERIOR
) COURT OF COOK COUNTY.
)
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MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Gaetona Costanzo, plaintiff, sued Thomas J. Friel and Charles C. Renshaw, as Trustees, etc., et al., doing business as Chicago Surface Lines; Deep Rock Oil Corporation, and Daniel Schmitt for damages for injuries sustained in an accident. Plaintiff dismissed the suit as to Deep Rock Oil Corporation. A jury returned a verdict finding defendant Schmitt not guilty and another verdict finding Friel and Renshaw, as Trustees, etc. (hereinafter called defendants), guilty and assessing plaintiff's damages in the sum of \$21,000. Defendants appeal from a judgment entered upon the verdict.

That this case was well tried clearly appears from the fact that the sole proposition relied upon for reversal of the judgment is, "The damages awarded are excessive."

Plaintiff, a housewife, kept a home for her husband, son and two granddaughters. She took care of the housework, washed the clothes and did the ironing for the family. The accident happened on August 9, 1944. Prior to that time plaintiff's health was "fine." She had never injured her back in any way and never had had any trouble with her legs. At the time of the accident she was a passenger upon a northbound Halsted street street car and was seated on the east side of the car, two seats from the front and next to the aisle. When the street car reached Evergreen avenue a collision occurred between the car and a

heavy eastbound oil truck belonging to Daniel Schmitt, and by the force of the impact plaintiff was thrown to the floor of the car and the lower part of her back came in contact with the edge of the seat. When the car reached Lincoln and Fullerton avenues the police took her off the car and placed her in a chair on the sidewalk. A police patrol wagon came and plaintiff was moved on a stretcher, placed upon the patrol wagon and taken to the Augustana hospital. She was carried into the hospital on a stretcher. Dr. Grosz, the attending physician at the hospital, upon examining plaintiff found some bruises on her arms and legs. He was unable to turn her over because she had too much pain "and she localized the pain in the lower back, just about the sacro-iliac joint. That is located in the spine and the pelvic bone joints. I palpated that area and found the place extremely tender, and the muscles hard, contracted. That usually means some injury to the neighboring parts. * * * She complained of severe pain in the lower back on the slightest motion of her body. She was not able to turn or move, extending the legs out from the spine, or when she would try to sit up off of the bed, she was not able to sit up or move." The doctor ordered X-ray pictures in order to determine "if there was any possible fracture to the bony portion." Dr. Beilin, the X-ray man in the hospital, took the X-rays and reported his findings the next day. Dr. Grosz testified that plaintiff was given sedatives to relieve the pain, and a board was placed under the mattress so the patient could rest, and to keep the back stiff; that after plaintiff had some relief from pain he put on a Buck's extension, connected to a pulley and weight, a pulling device, "in order to extend the feet and stretch the back * * * to relieve the muscular tension on the back, and try to align the broken bones"; that a few days later he applied a body cast of plaster of paris, that

extended from the upper thigh up under the shoulder, under the arms, and included the whole body; that the purpose of the cast was to keep the body in position; that plaintiff wore that cast for about four months, and before it was removed he had measurements taken to fit plaintiff with a brace made of leather and steel, "the purpose of the brace was that it was lighter than the body cast, and the patient should wear it steadily, so that the injured [part] could be fixed, so we kept the fixation, and she would be able to move back and forth." The purpose in keeping the spine fixed was, "First, to secure the healing, and secondly, to relieve that pressure in the neighboring tissues and nerves"; that after plaintiff wore the brace, "she complained of frequent pains in the back. * * * by the side where the fracture was, and some pains, excruciating, to the upper thigh, and buttocks, and numbness in the region. * * * On the upper part, outer extended part of the thighs, more on the right than on the left"; that against his advice plaintiff was taken to her home, where she was confined to her bed for four months, during which time she wore the cast. Plaintiff has worn the leather and steel brace continuously since she first used it and she testified that she can not get along without it. Dr. Grosz testified that he continued to treat plaintiff interruptedly and that in April preceding the trial her pains became quite severe and he advised another X-ray, which was taken. Dr. Horace E. Turner, "a surgeon who takes care of such conditions as broken bones, diseases of the joints, diseases of the apparatus of locomotion," also testified for plaintiff. He is a teacher of orthopedic surgery at the University of Illinois and a member of the staffs of half a dozen prominent hospitals in Chicago. He testified that he had had long experience in the use of X-ray and has had occasion to read thousands of X-rays; that he uses X-rays in his practice every day; that he examined

plaintiff on September 19 and 20, 1945, and found that the erector spinae muscles, the muscles that run parallel to the back of the spine, were rigid and spastic; that plaintiff complained of pain when he pressed in the region of the fifth lumbar vertebra down between the crests of the ilia; that he "did a Lesaegue test on the patient, which was positive; and I also did a Goldthwaite test on the patient, and this was also positive"; that the erector spinae muscles are the ones which produce the backward motion of the back when one attempts to move backward; that the condition of spasticity that he found "indicated that there was some painful lesions between the muscles and that the muscles were spastic, immobilizing that area"; that the function of the steel brace "is to immobilize, that is, to reduce or prevent motion in the spine. * * * Q. And when you say that the Lesaegue sign was positive, what do you mean? A. I mean that there was a limitation of motion in the lumbo-sacral region"; that the Goldthwaite test "is a similar test, done for the same purpose, and is accomplished by dorsally flexing the foot to a right angle, flexing the knee to a right angle, and flexing the thigh on the body at a right angle, and then with the leg and thigh in this position, you straighten the leg at the knee, and if the test is positive, you are not able to straighten the knee in the normal manner. There will be a resistance to that straightening, indicating that there is some difficulty in the lumbo-sacral region. Q. What is the relationship between the lumbo-sacral region and the legs? A. The relationship is that the muscles come down parallel to the spine, attach to the crests of the both ilia bones in the back, and then coming off from the region of the lower end of the pelvis, and that portion that we sit down upon, the muscles of the posterior portion of the thigh attach to that portion of the pelvis, and come down and attach

to the leg, so that when you put these muscles on taut, and then try to rock the pelvis, you have the rocking of the pelvis in the region of the lumbo-sacral joint. Q. Doctor, were these signs on only one leg, or on both legs? A. On both legs. Q. And what do you call that? A. We call that a bilateral positive Lesaegue test, and a bilateral positive Goldethwaite test."

Plaintiff introduced in evidence Exhibits 4 to 11, inclusive, which were X-rays, but these exhibits are omitted from the record by agreement of the parties. Dr. Turner was shown plaintiff's Exhibit 6 and he testified that he was able to determine from it "that there is some increased lordosis, that is, the dorsal curvature of the spine, as we look at it in this view. In the region of the fifth lumbar vertebra here in the lamina, which is the part that comes out from the bodies of the spine and goes posteriorly. We see a line of decreased density that is evidence of a fracture in that region. We see here that the space between the body of the fifth lumbar vertebra and the body of the first sacral segment is much narrower than the space between the body of the fifth lumbar vertebra and the body of the fourth lumbar vertebra, or any of the other spaces shown on this X-ray picture. * * * Q. Now, Doctor, going back to that pathology which you have just described in that film, in the region of the fifth lumbar, and with reference to the compression of the space between the fifth lumbar and the sacrum, do you have an opinion, based upon a reasonable degree of medical and surgical certainty, as to whether or not those conditions might or could be caused by an injury? * * * My opinion is that they could or might be caused by an injury." The doctor testified that "this film [Exhibit 5] shows the same condition as previously shown in the other film, namely, the line through here, and the compression and narrowing of the intervertebral space between the fifth lumbar vertebra and the first sacral segment." The witness testified that Exhibit

10 showed "that there is still a narrowing of the intervertebral disc space between the body of the fifth lumbar vertebra and the first sacral segment. It shows that the line through the lamina of the fifth lumbar vertebra has now been obliterated." The witness further testified that plaintiff's Exhibit 13 "shows here that there is a region on the right side of the patient's joint, between the fourth lumbar vertebra and the fifth lumbar vertebra, which is abnormal"; that plaintiff was in need of further medical service; "that she should have an operation on her back to fuse the fourth and fifth lumbar vertebrae to the sacrum. Q. And will you tell us what technique is employed in making that fusion? A. Yes. An incision would be made along the mid line of the back, over the area of the difficulty. Then the muscles would be stretched from the bone, and the spinous processes would then be cracked off either by a saw or a chisel, and then bone taken either from the leg, or from the crest of the ilium, would be laid across these areas, and then the facet joints on the side of the lumbar vertebrae four and five would be curetted out to remove the cartilage from those joints, so that the joints will then heal across, be solid bone, and then the pieces of bone that were laid across the fourth and fifth lumbar vertebrae bridging to the sacrum would be inclosed by sewing the muscles and skin back together again, and let them grow together so as to make a bony bridge across those vertebrae. * * * Q. What do you mean by fusion? A. A growing together, or a spanning from one bone to the other by a bony bridge." Upon cross-examination the doctor testified that plaintiff "has a narrowing of the space between the fifth lumbar vertebra * * * and the top segment of the sacrum, which * * * is the reason for the patient's pain in her back, because the surfaces there are roughened, and the normal cushion between those two bones has been partially eroded away * * * and

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I think that she is getting some pain in that region"; that he thought that the fracture was healed. Dr. Leon Aries, called as a witness for plaintiff, is on the staffs of a number of Chicago hospitals and in the course of his practice has read many thousand X-ray films. He stated that he had examined plaintiff and found that she walked with difficulty; that it took her a great deal of time to lower herself into a seat by supporting herself on the arms of a chair; that she had a normal blood pressure and her heart and lungs were within perfectly normal limits; that "her essential pathology was found in her lower back and lower legs. * * * There was a very marked spasm of the muscles of the lower extremities as well as the lower back"; that the Lasegue's sign indicated an irritation of the sciatic nerve, which runs from the lower back down into the extremities; that the lower back was extremely tender to touch on pressing over the first to the fifth lumbar vertebrae and the sacroiliac joint; that the fifth lumbar vertebra is the bone that lies at the level of the pelvis and connects the pelvic bone, which is the girdle that holds up the back with the spinal cord; that the sacroiliac joint is the joint to the right and left of the mid-line in the pelvis which joins the sacral bones with the pelvic bones; that he found that there had been some interference with the pathways of the sciatic nerve, which would cause a change in the Achilles reflex; that he "found on attempting to raise the patient from the level or horizontal at 25 degrees we were unable to bend her back forward because of spasm of the back muscles"; that from an X-ray shown him "we see that the space between the 5th lumbar and the superior surfaces of the sacrum is again diminished as compared with the 4th, the 3rd and the 2nd space and there is also in this film an increase in the density of the shadow of the bone as compared with the vertebrae above, and you notice that the shadows are homogeneous and alike, while in the lower

vertebral bodies, namely, the 5th and the upper surface of the sacrum that the shadow is more dense, showing that there is an increase in the calcium deposit in this area." The doctor further testified that based upon his studies of the X-rays and his examination of plaintiff that he was of the opinion that plaintiff is in need of "some form of stabilization of her lower back and removal of any pressure on the roots of the nerves as they emerge from the spinal canal, removal of the disc which I believe is pushing into the vertebral canal"; that that would be accomplished by "an operation for the removal of the slipped disc necessitates an incision in the lower back over the region of the 5th, 4th, 3rd lumbar vertebrae, the muscles that unsheath the bone must be removed laterally and then the bony roof of the spinal canal must be removed, which is known as a laminectomy and then the disc is carefully dissected away. Following this to strengthen the back at this lower end of the spine a fusion would be advisable to keep the back rigid so that it could not move around and cause any pain. Q. How would you accomplish the fusion, Doctor? A. Fusion of the lower back may be done in one of two ways. One is by putting a graft in from a distant part of the body, such as taking the graft out of the leg and putting it in the back or by doing a fusion by taking bone from the area and placing it in the lower back. * * * The laminectomy would be the first stage to remove the bone to get to the disc, and then the removal of the disc would be taking out this fibral cartilaginous substance that is pushing into the canal."

Dr. George L. Apfelbach, a witness called by defendants, had not examined plaintiff and could only testify as to her condition by an inspection of the X-rays. During his cross-examination the following occurred: "Q. And, Doctor, if there is a narrowing of the disc, there is pressure exerted on the disc,

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 and then the disc is a totally diseased body, causing this
 to strengthen the back at this lower end of the spine. A fusion
 would be advisable to keep the back rigid so that it could not
 move around and cause further pain. It would not accomplish the
 fusion, doctor. A fusion of the lower back may be done in one
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and on these nerves on the other side, isn't there? A. Yes, sir, in very many conditions in the back. Not just disc, but very many conditions. And then we feel that in the legs, because it affects this lumbar plexus group of nerves. I think I do a lot of this surgery over at Cook County and Alexian Brothers, and so forth. When I have a ruptured disc, I try to get it out without the laminectomy, but many times, I have to do a laminectomy, to get it out. You try to fuse the two bodies, if the patient's condition permits, but sometimes the operating time, and the severity of the operation makes you stop operation and just do the disc. It is quite a severe operation, and in some cases it is very desirable to fuse if you can." The doctor further testified that from looking at the X-rays he was of the opinion that this was not a case for a fusion operation, and that the Lasegue and the Goldthwaite tests are used for every back examination where there is a complaint of pain; that "the subject of slipped discs has been so overdone in medical literature that many doctors think every low back pain is a disc." Defendant called two experts as witnesses, Dr. Apfelbach and Dr. Zeitlin, neither of whom had examined plaintiff. Dr. Apfelbach testified that he did not know he was going to testify in the case until about half an hour before he took the stand. Both experts were called upon to testify as to what the X-ray pictures showed, and the effect of their testimony is that they could not see from an inspection of the X-rays any evidence of a fracture. Both testified that from only one X-ray picture out of a thousand can disc injuries be diagnosed and that they would not want to diagnose a disc injury without an examination of the patient. The jury, of course, passed upon the weight that should be attached to the testimony of the experts.

Plaintiff testified that if she takes off the leather and

and on these nerves on the other side, I think it is very
in very very conditions in the back, I think it is
very many conditions. And then I think it is very many
cause it affects this lower part of the back. I think
I do a lot of this surgery over at the back and I think
Doctors, and as far as I know, I think I have to
get it out without the anesthesia, but I think I have to
do a laminectomy, to get it out, to get it out of the
if the patient's condition is such that the operation
time, and the severity of the operation, and the operation
and that is the time, it is a time, and in
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Further testified that from looking at the film he was of the
opinion that this was not a case of a tumor operation, and
that the tumor and the film, the tumor was not for every
back examination where there is a possibility of doing that the
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years that many doctors think every time it is a disc.
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Dr. Kettling, neither of whom had examined Plaintiff. Dr. Apol-
on testified that he did not know he was going to testify in
the case until about half an hour before he took the stand.
Both experts were called upon to testify as to what the X-ray
pictures showed, and the effect of their testimony is that they
could not see from an inspection of the X-ray any evidence of a
fracture. Both testified that from only one X-ray picture out
of a thousand can disc injuries be diagnosed and that they would
not want to diagnose a disc injury without an examination of the
patient. The jury, of course, passed upon the weight that should
be attached to the testimony of the experts.
Plaintiff testified that if she takes off the leather and

steel brace her back goes down; that sometimes she gets a sharp pain in the lower back and she cannot bend it; that sometimes her legs get numb and she gets a shake in the leg; that sometimes when she wants to stand and walk "my leg go out, you know, shake and go out. * * * Especially the right one"; that she gets "awful pain" especially when the weather is bad; that she cannot go up and down long stairs; that she uses a cane now to help her get around; that she wears low heeled shoes, "like a man's shoe"; that she is now unable to put on her shoes and stockings because she cannot bend sufficiently low to put them on.

Defendants contend that "it seems clear from the testimony of plaintiff's doctors that the condition resulting from the compressure of the cartilaginous disc between the fifth lumbar vertebra and the first sacral segment, is but a temporary condition which can be corrected and obviated as soon as plaintiff sees fit to follow their advice. There is no evidence that the operation is a dangerous one or that there is any reason to anticipate an unfavorable result. On the contrary, Dr. Turner said: 'if that is done, it should, in the normal course of events, and with reasonable medical certainty, obviate the condition.'" It is sufficient to say as to this contention that there is no evidence in the record that plaintiff ever refused to have an operation. Nor can we agree with the argument that there is no reason to anticipate an unfavorable result of the operation proposed by Dr. Turner. Dr. Apfelbach, defendants' expert, testified that the fusion operation is a severe one, to be avoided if possible. In McNary v. Hanley (Cal. App.), 20 P. (2d) 966, the court states: "It is true that plaintiff is in duty bound to minimize his damage in any way that he reasonably can, and if he negligently refuses to do so he cannot recover for that which he might have prevented. It is for appellant to

stood back her back down; that sometimes she felt sharp pain in the lower back and she cannot bend it; she sometimes her legs get numb and she gets a shock in the leg; that sometimes when she wants to stand and walk "my leg go out, you know, shake and go out, * especially the right one"; that she gets "winding pain" especially when the weather is bad; that she cannot go up and down long stairs; that she used to come now to help her get around; that she wears low-heeled shoes; "like a man's shoe"; that she is not able to put on her shoes and stockings because she cannot bend sufficiently low to put them on.

Defendants contend that it seems clear from the testimony of plaintiff's doctors that the condition resulting from the compression of the vertebrae is a permanent condition and the first surgical operation, is but a temporary condition which can be corrected and avoided as soon as plaintiff goes to follow their advice. There is no evidence that the operation is a dangerous one or that there is any reason to anticipate an unfavorable result. On the contrary, Dr. Turner said: "If that is done, it should, in the long course of events, and with reasonable medical judgment, result in the condition." It is sufficient to say as to this contention that there is no evidence in the record that plaintiff ever refused to have an operation. Nor can we agree with the argument that there is no reason to anticipate an unfavorable result of the operation proposed by Dr. Turner. Dr. Apolisch, defendant's expert, testified that the fusion operation is a severe one, to be avoided if possible. In McNary v. Hanley (21, App.), 20 P. (2d) 966, the court stated: "It is true that plaintiff is in duty bound to minimize his damages in any way that he reasonably can, and if he negligently refuses to do so he cannot recover for that which he might have prevented. It is for appellant to

establish that the steps taken by plaintiff to so minimize his loss or damage falls short of the obligation so fixed. In other words, the burden is on defendant to establish matters asserted by him in mitigation or reduction of the amount of plaintiff's damage * * *." The court also called special attention to the fact that the trial court had placed his stamp of approval upon the amount fixed by the jury. In Morro v. Brockett, 109 Conn. 87, 93, 94, 145 A. 659, 661, it was said: "The burden is on the plaintiff to establish that the injuries for which he seeks damages were the proximate result of the negligence of the defendant, but when a prima facie case had been made out, as in this instance, it becomes incumbent upon the defendant if he seeks to exonerate himself from responsibility of a portion of the consequences to show that some of these had their proximate cause in the failure of the plaintiff to act in good faith in an attempt to promote recovery and avoid aggravation of the initial injury. Watson on Damages for Personal Injuries, p. 247, sec. 192."

Upon the oral argument counsel for defendants stated that in his opinion one-half of the amount awarded by the jury would sufficiently compensate plaintiff for any injuries that she sustained by reason of the accident.

"Unless the verdict is of such magnitude as to show passion and prejudice on the part of the jury, the Appellate Court has no right to disturb it, as the amount to be fixed is largely in the discretion of the jury. Grannon v. Donk Bros. Coal & Coke Co., 173 Ill. App. 395, aff'd 259 Ill. 350, 102 N. E. 769. Fitzpatrick v. California & Hawaiian Sugar Refining Corp., Ltd., 309 Ill. App. 215." (Gleason v. Cunningham, 316 Ill. App. 286, 294.)

"In Bowes v. Public Service Ry. Co. (N. J.), 110 Atl. 699, 700, the court said: 'The word "excessive" has a relative meaning. * * * At a period when the purchasing power of the dollar has in the language of the day been "cut in half," the value of

the sum awarded here is not to be estimated in the numerical quantum of the recompense, but in its comparative ability to furnish the necessities of life. Of these facts the court must take judicial notice.'

"In Quinn v. Chicago, M. & St. P. Ry. Co., 162 Minn. 87, 90, 202 N. W. 275, 276, the court said: 'In recent years there has been a noticeable increase in the size of verdicts in personal injury cases. The courts approve of verdicts today which would have been unhesitatingly set aside as excessive 10 or 15 years ago. Measured in money, the earning capacity of most men has increased; measured in purchasing power, the value of a dollar has decreased. No immediate change in the situation is in sight. It is only right that these well-known facts should be taken into consideration.'

"In Weadock v. Eagle Indemnity Co. (La.), 15 S. (2d) 132, 146, the court said: '* * * the decreased purchasing power of the American dollar, with little or no prospect for any change, except probably further decrease, for many years, is a pertinent factor to be taken into consideration in determining the award.'

"We have often recognized, in passing upon the amount of damages awarded, the decline in the purchasing power of money. To cite a few cases: Posch v. Chicago Rys. Co., 221 Ill. App. 241, 254, 255; Maskaliunas v. Chicago & W. I. R. Co., 235 Ill. App. 198, 221; Ehrenheim v. Yellow Cab Co., 239 Ill. App. 403, 409; Lagatutte v. Chicago Daily News Co., 239 Ill. App. 675 (Abst.); Foreman Brothers Banking Co. v. Consumers Co., 226 Ill. App. 662 (Abst.)." (Howard v. Baltimore & O. C. Terminal R. Co., 327 Ill. App. 83, 102, 103. Appeal Denied, 391 Ill. 629.)

We have given careful consideration to the contention that the damages awarded are excessive, and we have reached the conclusion that we would not be justified in ordering a remittitur.

The judgment of the Superior court of Cook county is affirmed
JUDGMENT AFFIRMED.
Sullivan, P. J., and Friend, J., concur.

The judgment of the Superior Court of Cook County is affirmed.

The damages awarded are excessive, and we have reduced the award to the amount of \$100,000.00.

The judgment is affirmed with costs.

103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM

A. D. 1946

Term No. 46015

331 I.A. 107
Agenda No. 19

LOUISE TEUTRINE,

Plaintiff-Appellee,

-vs-

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a Corporation,

Defendant-Appellant.

)
) Appeal from the
) Circuit Court of
) St. Clair County,
) Illinois.
)

Smith, J.

This cause is an appeal from the Circuit Court of St. Clair County, Illinois, heard by the court without a jury. The court found the issues for the Plaintiff-Appellee, Louise Teutrine, hereinafter called the plaintiff, and against the Defendant-Appellant, The Prudential Insurance Company of America, a Corporation, hereinafter called the defendant.

The plaintiff was the wife of Raymond Teutrine, deceased, and was the beneficiary of a policy of life insurance issued by the defendant upon his life in the face amount of \$1,000.00, which contained a double indemnity provision for payment of an additional \$1,000.00, if death resulted directly and independently of all other causes, of bodily injuries, effected solely through external, violent and accidental means and not directly or indirectly from bodily or mental infirmity or disease in any form. The face amount of the policy was paid by the defendant and this action was

brought to recover the additional \$1,000.00, under the double indemnity provision of the policy.

It appears from the evidence that Raymond Teutrine, hereinafter referred to as the insured, arrived at his home from work on March 14, 1945, and the plaintiff, his wife, saw a cut on his head about an inch long and between 1/8 and 1/4 inch deep, which she doctored by applying some "Clover-inc" salve. The insured worked the next day and continually until March 31, 1945, when he passed out while at work. He was hospitalized and treated for food poisoning and was discharged the next day. However, he had been bothered with constant headaches since March 14, and about March 18 or 19, he went to Dr. Eisele to obtain relief from his headaches. During April, 1945, Dr. Kane was called to the insured's home several times because of his headaches, which kept getting worse but he continued working until May 14, 1945. Dr. Culbertson was then called to treat the insured and May 26, 1945, he was again hospitalized. Various tests were run on the insured and X-rays of the skull and gastrointestinal tract were taken and Dr. Culbertson made a final diagnosis of migraine-spasm of pylorus. He was discharged from the hospital on June 5, 1945. He lost consciousness while at Dr. Culbertson's office June 11, 1945, and again at his home later that evening and was taken to the hospital, where he died a few hours later, on June 12, 1945. An autopsy was performed by Dr. Hagebusch and disclosed that death was due to a tumor or cyst, which was apparent on the surface of the left half of the brain.

There is no dispute about the facts, as above related, and the only question was whether the tumor or cyst was caused directly and independently of all other causes by a

bodily injury effected solely through external, violent and accidental means, and was not the result, directly or independently, of bodily or mental infirmity or disease in any form.

The defendant, in points 1 and 2, of its assignment of errors for reversal of the judgment of the trial court, states that the plaintiff did not produce the quantum of evidence as a matter of law and fact to entitle her to a judgment and that the overwhelming and manifest weight of the evidence is against her. It is therefore necessary to carefully examine the evidence before the trial court.

The evidence shows that the insured had not been sick and that he had not sustained an injury prior to March 14, 1945, the date he received the cut on his head. Therefore the principle question is whether or not the plaintiff produced sufficient evidence to warrant the trial court in finding that the tumor or cyst, which caused the insured's death, developed from the trauma to the insured's head and that it was not in existence when the cut was received. This question resolves itself around the medical testimony which was heard by the trial court.

The hospital records concerning the insured fail to furnish very much evidence upon this question. No mention is made in the records of St. Mary's Hospital of the insured's injury upon his admission there March 31, 1945. The records at Christian Welfare Hospital, where the insured was a patient from May 26, to June 5, 1945, show that the insured was admitted for relief from migraine, with a history of temporal headaches; that his present illness began a few weeks previous with pain in the head and gastric disturbances; that X-ray examinations of the skull in four views failed to

reveal any evidence of fracture or bony tissue and that final diagnosis was migraine-spasm of pylorus. The records of St. Mary's Hospital on the insured's second admission, a few hours before his death reveal that the patient was admitted by ambulance; that he had been unconscious for two hours and that there were aimless movements of his hands and head. These reports merely confirm the fact that the insured had suffered from headaches but fail to definitely associate them with the injury to his head.

The autopsy reports of June 12, 1945, which were part of the records of St. Mary's Hospital, indicate that there was a complete autopsy of the body and head of the deceased insured. The brain was removed and there was an apparent area of either gliosis or tumor occupying a large portion of the entire left cerebral hemisphere, which had undergone cystic degeneration. There was no hemorrhage or softening in any area of the brain and a cystic change was apparent in the brain tumor.

Dr. Culbertson was the only doctor who testified for the plaintiff. He reviewed the professional services he had rendered the insured and related the difficulty he had in diagnosing the insured's illness when he treated him from May 26, to June 5, 1945. He testified that he thought a trauma could produce a tumor or a cyst provided that there was damage to the tissue of the brain and a hemorrhage resulted therefrom; that he thought it would be necessary for that portion of the anatomy that develops a tumor to receive a blow in order to produce a tumor and that in such cases it could produce death within 60, 80 or 90, days; that he did not know how long the tumor had existed in this case;

that he did not think a tumor would degenerate into a cyst in a few days time and couldn't say how long it would take, that he didn't see any evidence of hemorrhage; that the existence of headaches, gastric disturbances and eye disturbances would be evidence of a brain hemorrhage and that he considered Dr. Hagebusch a competent and qualified man to perform autopsies and make analysis of tissues and confirmed Dr. Hagebusch's report.

Dr. Hagebusch, who performed the autopsy on the body of the insured, was the only witness called by the defendant. He testified that the brain tumor he found was the immediate cause of the insured's death; that the tumor was an astrocytoma arising in the glia or supporting structure of the frame work of the brain and that this tumor had degenerated into a cyst and had several cystic areas filled with light yellow fluid; that this type of tumor is very slow in growing and must have existed months and perhaps years; that it ordinarily takes quite a period of time for a tumor to degegenerate into a cyst, it may take months; that this tumor was a benignant type of tumor, which is much slower growing than the malignant type, and that in his opinion the tumor found in the brain of the insured had existed for quite a long time prior to March 14, 1945.

The defendant cites the following cases, Ebbert v. Metropolitan Life Insurance Company, 289 Ill. App. 342, aff. 369 Ill. 306; Schroeder v. Police & Firemen's Ins. Assn., 300 Ill. App. 375; Welte, Admr., etc., v. Metropolitan Life Ins. Co., 305 Ill. App. 120; Crandall v. Continental Casualty Co., 179 Ill. App. 330; Robinson v. U. S. Health & Accident Ins. Co., 192 Ill. App. 475; and Sec. 92 of the Practice Act, to support its contention that under the

facts of this case, judgment should be entered by this court for the defendant. It is true that this court may exercise this power and such action was taken in the cases cited. However, each of the cases cited is readily distinguished from the facts of this case as in all of these cases there was definite evidence of sickness which existed prior to the bodily injury and which sickness did cause, or contribute to, the death of the insured. In the case at bar there is merely the opinion of one of the doctors that the brain cyst existed prior to the injury to the insured.

The defendant cites the following cases, *Conreaux v. Industrial Com.*, 354 Ill. 456; *Shell Petroleum Corp. v. Industrial Com.*, 366 Ill. 642; and *Liquid Carbonic Co. v. Industrial Com.*, 352 Ill. 405, as cases similar to the case at bar in which the Supreme Court reversed judgments for the claimants. An examination of these authorities shows in each of them that there was no causative connection between the accidental injury and the death of the insured.

We cannot agree that any of the above cited cases are in point with the facts of this case. There was no evidence before the trial court showing that the insured had been ill prior to March 14, 1945, when he received the injury to his head. The evidence shows that after this injury he continued to suffer from severe headaches, which became progressively more severe, up until his death. The defendant fails to establish any reason for the existence of the cyst or tumor and the trial court was justified in concluding that it was the result of the injury to the insured's head. It is reasonable to assume that a tumor could not have existed in the insured's brain for months or years without causing some symptom of illness to the insured. Dr. Hagebusch's

testimony, that the cyst existed prior to the date of the injury to the insured, represents his technical opinion. The trial court was, under the circumstances of this case, justified in considering this testimony with that of other witnesses and in reaching a contrary conclusion.

Dr. Culbertson was of the opinion that the cyst could have developed from an injury such as the insured was shown to have received. It is true that Dr. Culbertson saw no evidence of hemorrhage, which he said was essential to cause a cyst in such cases, but it does not follow that such evidence was not present at the time of the injury to the insured.

We cannot agree with the contention of the defendant that there was not sufficient evidence before the trial court to support the finding that the death of the insured resulted directly and independently of all other causes from bodily injuries effected solely through violent and accidental means and did not result directly or indirectly from bodily or mental infirmity or disease in any form.

The following cases are cited by the plaintiff to support her contention that there was sufficient evidence introduced to support the finding of the trial court. In the case of Horrie v. Industrial Casualty Ins. Co., 272 Ill. App. 252, the jury returned a verdict for the plaintiff, who sued as executor for an insured under an accident policy. The question involved was whether a cancer which developed was the result of a fractured leg or traceable to a pre-existing cancer. The court in commenting on the evidence said, "Whether this prima facie case was overcome by expert testimony was a question for the jury to determine; and we would not be justified in reversing their judgment under

these circumstances." In the case of Prehn v. Metropolitan Life Ins. Co., 267 Ill. App. 190, the Appellate Court affirmed the judgment of the trial court, which heard the case without a jury, where the facts were similar to the case at bar. The evidence showed that death resulted from a ruptured spleen and that the insured had first complained of pain after arising abruptly from a tilted chair September 12, 1930. The insured continued working that night but the next day received medical attention for severe abdominal pains, was later hospitalized and died September 17, 1930. It developed from the testimony . . . that the insured had fallen from a scaffold on June 14, 1930, prior to the issuance of the policy but that 10 days later he was seen playing baseball. The medical testimony concerning the autopsy showed that a ruptured spleen had caused the death but that there was also a scar in the spleen which showed some prior injury, perhaps the fall from the scaffold, which weakened the spleen, but that the direct cause of death was of recent origin. Another doctor testified that there were some adhesions in the spleen of old origin but that the ruptured spleen could have been caused by a man quickly arising from a chair. An expert witness for the defendant testified that, assuming a healthy man with a healthy spleen, his rising from a chair suddenly could not have caused a ruptured spleen. Notwithstanding, the court affirmed the trial court and said, "We are of the opinion that the evidence sufficiently showed Prehn's death did result from such violent and accidental means and independent of other causes" In the case at bar the trial court properly found that the brain cyst could have developed from the injury to the insured.

In actions relying on medical testimony it is usually difficult to establish facts absolutely. However, absolute certainty is neither required nor expected before a fact can be said to be proven in a civil case. (May v. Belleville Enameling & Stamping Co., 247 Ill. App. 275, 279) In a civil case a plaintiff is entitled to recover if the evidence creates probabilities in his favor, that is, if the weight of the evidence inclines to his side. (Hurzon v. Schmitz, 262 Ill. App. 337, 339.) The trial court in the case at bar properly found the weight of the evidence inclined to the side of the plaintiff.

The case at bar was tried without a jury and the court had an opportunity to hear the witnesses and to observe their demeanor while testifying. It is not within the province of a court of review to substitute its findings of fact for that of the trial court unless the findings of the trial court are manifestly against the weight of the evidence. (Coleman v. Hait, 293 Ill. App. 615; Wear Proof Mat Co. v. Bastian-Morley Co., 268 Ill. App. 455, 464; Alton Banking, etc., Co. v. Alton Bldg., etc., Ass'n, 289 Ill. App. 177, 186.) We do not consider the findings of the trial court in the case at bar manifestly against the weight of the evidence.

The defendant assigned as its third error for reversal of the judgment of the trial court, that due proof was not submitted to the defendant as provided by the terms of the policy, to entitle the plaintiff to recover under the double indemnity provision of such policy. In support of its contention the defendant cites, Feder v. Midland Casualty Co., 316 Ill. 552. In this case only a verbal notice was given by the husband of the beneficiary to an agent for the insurance company. The court held that the making of proofs

of death was a condition precedent to any liability on the policy. In the case at bar it was alleged that proof of death was furnished on forms submitted by the defendant. The defendant in its answer alleges that the plaintiff did not furnish proof of death by accidental means, but the answer is not verified by oath. Thus this matter was not properly put in issue. It was stipulated that \$1,000.00, with accrued dividends, had been paid by the defendant to the plaintiff for the face of the policy and thus the defendant must have received notice of the death. It does not appear that an issue was made of this point in the trial court. It is now too late to urge that failure to give notice of accidental death will bar recovery by the plaintiff.

For the reasons assigned it is the judgment of this court that the judgment entered by the trial court in this cause should be, and the same is hereby, affirmed.

JUDGMENT AFFIRMED.

CULBERTSON, P. J. CONCURS.

BARTLEY, J., FILES A DISSENTING OPINION.

OPINION TO BE PUBLISHED IN ABSTRACT ONLY.

FILED
F. 3 27 1947
Stanley R. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM

A. D. 1946

3301.A. 107
Dissent

Term No. 46015

Agenda No. 10

LOUISE TEUTRINE,)	
)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
-vs-)	St. Clair County,
)	Illinois.
THE PRUDENTIAL INSURANCE)	
COMPANY OF AMERICA, a Corporation,)	
)	
Defendant-Appellant.))	

BARTLEY, J.

By reason of the specific provisions of the Policy of Insurance in question here, the plaintiff had the burden of showing the death of Insured by accidental means, as a result directly and independently of all other causes of bodily injuries, effected solely through external, violent and accidental means, of which there was a visible contusion or wound on the exterior of the body, and that such death occurred within ninety days of the accident. (Wilkinson v. Aetna Life Ins. Co., 240 Ill. 205;)

In my opinion there is no competent evidence in the record which shows that the Insured died by accidental means as the result of any bodily injuries, effected solely through external, violent and accidental means. Moreover, the clear weight of the evidence shows that the Insured died as a result of an astrocytoma tumor which had degenerated into a cyst with several cystic areas, which

had been in existence months or years prior to March 14, 1945 and, therefore, if we assume, which I do not, that the cystic tumor was caused by accidental means, it must have occurred more than ninety days before the date of the Insured's death on June 12, 1945 and, therefore, not within the ninety day provision of the Policy.

It is my opinion, therefore, that the judgment of the trial court should be reversed and being of this opinion and having the views here expressed, I must respectfully dissent from the opinion of the majority of the court.

I have other criticisms of the views expressed in the Opinion. It would serve no useful purpose to set them forth, inasmuch as I am dissenting from the opinion of the majority in its entirety.

FILED
F 3 27 1947
Stanley R. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

O.K. G.W.B.
277
Gen. No. 10118

Agenda No. 20

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1946

Frances McDonald, Harlan
Golding and Floyd Golding,

Plaintiffs-Appellants

vs.

331 I.A. 107

Appeal from the
Circuit Court of
Kankakee County,

Doreen Scanlon,

Defendant-Appellee

DOVE, J.

The plaintiffs are the father, mother and brother of Dale Golding, deceased, and they brought this action in replevin to recover possession of a camera, a radio and a Ford automobile which they allege belonged to the said Dale Golding at the time of his death. The defendant claims title to this property by gift thereof to her by the said Dale Golding. A jury was waived and the trial court's judgment was in favor of the defendant, ~~and~~ awarding her a writ of reterno habendo and \$25.00 damages for the detention of the property. This appeal followed.

The evidence discloses that on October 20, 1942 Dale Golding entered the military service of the United States. A year before he had traded in a Chevrolet automobile for the automobile in question. He was killed in Luzon on March 26, 1945 and was twenty-four years old at that time. Since he was eight years old he had made his home on a farm near Herscher with his maternal grandparents, but for three months before he left for the Army he had been staying at the home of appellee's parents. He was never

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married but he and appellee were engaged to be married and had been for eleven months at the time he entered the service. His mother had previously given him the radio and camera, which are also involved herein, and at least six months before he entered the service he had left the camera and radio with appellee, who kept them at the home of her parents who lived on a farm near Herscher, where she was also living.

James Scanlon, the father of appellee, testified that at the time Dale brought the radio over to his home he heard him tell appellee that the radio was hers, that she could keep it and that he had no use for it, that on the day before he went to war he was at their home, cleaned the car and said to appellee, "here, it's your car, keep it clean". That he left the car there that day and it remained there until taken from appellee by the sheriff under the writ of replevin in this case.

Mrs. Donald Boudreau, a cousin of appellee, testified that she and her husband and Dale and appellee were close friends and that upon one occasion a few weeks before Dale entered the service, "we asked him (Dale) what he was going to do with his car and he said I am leaving the car with Doreen (appellee)".

James Scanlon, a brother of defendant, testified that upon the occasion to which his father referred in his testimony, Dale said, "I am sweeping it (the car) out, Honey, (referring to appellee) and I want you to keep it clean because it's yours".

Nelda Scanlon, the mother of appellee, corroborated her husband and son, and testified that she heard Dale say the day before he entered the service: "Honey, this is your car, take good care of it:" that she and her husband were sitting in the swing near the gate and that the others were gathered about the car and cleaning it when Dale said this.

Appellee testified that about one week after Dale's death she told appellant, Frances McDonald, the mother of Dale, that she "would like to keep the car and that if I had to buy it in order to keep it, that's what I would do": that thereafter she received a letter from this appellant to the effect that she (Mrs. McDonald) had received title to the car and in reply thereto, appellee wrote her that she would like to buy the car and on June 26, 1945 wrote: "I think you know how much that car means to me and how much I would like to keep it. I will give you \$700.00 for the car. --- If you accept this offer, I'll leave you a check for \$700.00 at the bank, if not, you can come and get the car any time. It will be exactly where Dale left it two years and eight months ago". Appellee explains this by stating that Mrs. McDonald had advised her that she (Mrs. McDonald) had the certificate of title to the car and that she, appellee, supposed the certificate of title "controlled" the ownership of the car.

Frances McDonald, the mother of Dale, testified that the certificate of title was found among Dale's papers at the home of her parents, that upon her affidavit that she was the owner of the automobile a certificate of title was issued to her by the Secretary of State on May 24, 1945, that Dale told her he was going to leave the car with appellee and that she was going to drive it and keep it up while he was in service; that in April, 1945 appellee said she would like to keep the camera and the car and offered to buy the car and asked how much Mrs. McDonald wanted for the car, that later, in August 1945, appellee told her she was not going to let her have the car, that this appellant then said to appellee that she had title to the car, but appellee stated Dale had given it to her.

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On November 30, 1943, in a letter written by Dale to appellee, he said: "the car is yours so do as you please" concluding with a reference to some "stuff" which he said he had used in the radiator of his Chevrolet and also in this Ford. Again, on December 9, 1943 he wrote: "You said you repainted the strip along the top of the trunk lid on the car. That paint has been peeling off for a long time. I often thought of scratching it off and painting it over but never did. I guess I knew who would take care of it, didn't I? It's yours, honey, so whatever you do to it is alright with me, just so some 4F doesn't take my place in it, and I don't think he will".

Counsel for appellants insist that gifts of property must be established by clear and convincing evidence; that in this case the only evidence of a gift is the testimony of the father, mother and brother of appellee; that there is no evidence of actual delivery of the car to appellee by Dale and that the evidence is merely that Dale left the car with appellee for safekeeping while he was in the armed service; that he kept the certificate of title and that appellee's expressed desire to buy the car after Dale's death refutes her claim that Dale gave the car to her.

It is true that the idea of a gift of the car is negatived by appellee's offer to buy. Her testimony is that she told Mrs. McDonald that the car meant much to her, that she would like to keep the car and that if she had to buy it in order to keep it, she would do so, that Mrs. McDonald told her she had the certificate of title and that appellee supposed that was controlling. It is also true as argued by counsel that mere possession of property after the death of the alleged donor is not of itself sufficient to prove a valid gift, nor is intention to make a gift, alone, sufficient. The requirements necessary to make a valid gift have frequently been

enunciated and need not be repeated here. (In re: Estate of Meyer, 317 Ill. App. 96; Rothwell v. Taylor, 303 Ill. 226; In re: Estate of Huston, 319 Ill. App. 361) Nor does the fact that one of the appellants holds a certificate of title to this automobile preclude appellee from asserting her title thereto in this proceeding. (L.B. Motors Inc. v. Pritchard, 303 Ill. App. 318; Commercial Credit Corp. v. Moran, 325 Ill. App. 625).

The undisputed and uncontradicted evidence in this record is that the former owner of this property delivered it into the possession of appellee and it there remained until this action was commenced. His statements made at the time the radio and automobile were delivered to appellee evidences his intention to clothe appellee with title thereto. That this was his intention insofar as the car is concerned is manifested by his letters written to her while he was in the service to the effect that the car was hers and for her to do with it whatever she pleased.

We have set forth a fair resume of all the evidence found in this record. The testimony is not conflicting and there is nothing unreasonable or inherently improbable in the defense interposed in this case, and we are unable to say the trial court was not warranted in rendering the judgment ordering the return of this property to appellee.

In view of our conclusion, it is unnecessary for us to consider the contention of appellee that this suit is not brought by the personal representative of the deceased.

JUDGMENT AFFIRMED.

43415

IN THE MATTER OF THE ESTATE OF
PORTER MADDOX, Deceased,

PETITION OF HERMAN MADDOX, as
Administrator of the Estate of
PORTER MADDOX, Deceased, for
Citation to Recover Property and
Discover Information,

Petitioner and Appellee.

Appeal of ODESSA FLANAGAN,

Respondent and Appellant.

APPEAL FROM

CIRCUIT COURT

331 I.A. 108
COCK COUNTY.

147

MR. PRESIDING JUSTICE LEVE DELIVERED THE OPINION OF THE COURT.

Petitioner Herman Maddox, administrator of the estate of Porter Maddox, deceased, filed a petition for a citation under the provisions of section 183 of article 15 of the Probate Court Act, to recover a Packard automobile alleged to be the property of the estate of the deceased. The Probate Court found in favor of the petitioner. On appeal from the Probate Court the cause was tried de novo in the Circuit Court without a jury, and judgment was rendered in favor of the petitioner. Respondent appealed to the Supreme Court of Illinois, which transferred the cause to this court.

The record discloses that on October 28, 1941 Porter Maddox purchased a Packard automobile by making a small cash payment and receiving a trade-in allowance. The balance of the purchase price, amounting to \$1,238.52, was evidenced by a conditional sales contract payable in monthly instalments of \$68.80 each. On November 5, 1941 the Secretary of State issued a certificate of title for the automobile to Porter Maddox.

It appears that shortly before the death of Porter Maddox respondent, while driving the automobile with his permission, had an accident in which it was damaged. She took it to the Packard company for repairs, where it has remained ever since. On March 27,

1943 Porter Maddox died.

In her answer to the petition respondent avers that on March 11, 1943 Porter Maddox executed and delivered an assignment of all right, title and interest in the contract for the purchase of the Packard automobile; that she had in her possession the certificate of title, the conditional sales contract, and certain notes; that the sales contract and notes were delivered to her when she made the final payment; and that respondent paid the total sum of \$806.82 on account of the purchase of the automobile.

As grounds for reversal respondent urges (1) that the court erred in refusing admission in evidence of a photostatic copy of the alleged assignment, and (2) in permitting respondent to be called as a witness under section 60 of the Civil Practice Act at the instance of the petitioner.

Respondent testified in substance that the deceased came to her in February of 1942 to make a loan; that "at the time he was behind in his payments and had been ill. I offhand let him have on the 19th of February \$120, and he came back again March 14; I loaned him \$50. All of the money order receipts have the name of Porter Maddox I think. I do not know just how many there were, as some were for small amounts."

Referring to the assignment, respondent's Exhibit 1 for identification, the witness testified: "I had the original in my possession after the 12th of March and until the 12th of May, 1943, on which day I came back from the Edison Building to get a \$100 refund I had paid as a deposit to use electricity in an apartment building. * * * I had these leases to return, there were two oil leases, my mother's and mine, and this paper and some more insurance papers. I had been to the Edison Building down in the Loop and

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went back on the elevated to 48th Street and went up in the insurance office of Mr. Knight. When I came out of there I didn't have the papers, that is where I missed them. Neither did I have the oil leases." The respondent further testified that after discovering that she had lost the assignment in question she "went back and looked all over" but was unable to find it; that the photostatic copy was made about three weeks before she lost the original.

Mittie David, called by respondent, testified that about March 12, 1943 she accompanied respondent to the County Hospital in Chicago where she saw Porter Maddox; that Porter Maddox signed a white paper which she and the respondent also signed; that the witness did not read the original of the document, and that the photographic copy shown her by respondent's counsel at the trial bore "a picture" of her signature.

The record discloses that at the trial respondent's counsel served a written notice upon the petitioner to produce the original assignment; that "otherwise respondent would offer a photostatic copy of the said instrument in lieu of the original." In The People v. Wells, 380 Ill. 347, 355, the court said: "In order to let in secondary evidence of contents of a written instrument, the person to whose possession it was last traced must be produced unless this is shown to be impossible, in which case search among his papers must be proven if that can be done. In all events search must be made for the paper with the utmost good faith and the search must be as thorough and diligent as if the rule were that all benefit of the paper would be lost unless it be found. (Prussing v. Jackson, 208 Ill. 85; Mullanphy Savings Bank v. Schott, 135 Id. 655; Sturgis v. Hart, 45 Id. 103; Cook v. Hunt, 24 Id. 536.)"

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In his brief petitioner argues that there is no similarity between known genuine signatures of the deceased and his alleged signature on the alleged copy of the alleged assignment and that "had it been shown that an assignment actually existed this alleged copy was properly excluded by the court." We are unable to agree with petitioner's contention. There was evidence that the assignment existed; that it was lost and that respondent made a diligent search to find it. With respect to the signature of the deceased appearing on the photostatic copy, respondent and Mittie David both testified that they saw Porter Maddox sign the original. In these circumstances whether the signature of the deceased appearing on the photostatic copy is authentic is a matter of proof.

Application of the principles announced in the foregoing authorities leaves no doubt that respondent's photostatic copy was improperly excluded from the evidence.

As to petitioner's next contention, it appears that at the close of petitioner's testimony petitioner's counsel suggested that the trial court examine the respondent, on the ground that petitioner did not want to be bound by her testimony, whereupon the trial judge stated, "You are not bound by it under section 60 of the Civil Practice Act." The record discloses that respondent purportedly was called to testify as under section 60 of the Civil Practice Act. This section in our opinion has no application in the present proceeding. The procedure in the instant case is governed by section 185 of the Probate Court Act.

In In re Estate of Halaska, 307 Ill. App. 176, 179, this court in construing section 185 said: "It is discretionary with the court whether the party alleged to have property belonging to the estate shall be examined under oath, but it is the court which calls him by citation and is to examine him, which of course the court may do by attorneys. (Merchants' Loan & Trust Co. v. Egan, 222 Ill. 494;

Wilson v. Froehnow, 359 Ill. 148; Merchants' Loan & Trust Co. v. Egan, 143 Ill. App. 572.)" In the present proceeding respondent was the court's witness. (In re Estate of Franklin Magill, Deceased, 327 Ill. App. 212.)

For the reasons stated, the order entered January 5, 1944 is reversed, and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

KILEY AND BURKE, JJ. CONCUR.

43666

ELSIE KING,

Appellee,

v.

BENJAMIN E. FISHBAIN and LOUIS
KLETCHER,

Defendants.

On Appeal of BENJAMIN E. FISHBAIN,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

331 I.A. 109

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff, a tenant. There was a jury trial and verdict and judgment in plaintiff's favor for \$500 against each defendant. Defendants' motions for a judgment non obstante veredicto and for a new trial were overruled.

Defendant Fishbain appeals.

The complaint, consisting of two counts, alleges in substance that on October 3, 1943 plaintiff occupied one of the apartments in the premises owned and maintained by the defendants, under a written lease; that defendants rented the premises in question knowing that a nuisance and dangerous condition existed therein, namely, that there were at the time of the letting numerous large holes and depressions in the tile floor of the bath room in the apartment occupied by the plaintiff and her family; that defendants well knowing of the dangerous condition failed and refused to repair such dangerous nuisance and condition; that at the time of the letting the defendants were informed of the dangerous condition of the tile floor in the bath room of the apartment occupied by the plaintiff, and that the defendants at the time of said letting agreed to keep the said premises in a proper state of repair. Defendants answered and denied all of the allegations of the complaint.

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The evidence shows that the plaintiff and her husband took possession of the apartment in question on June 1, 1941 under a written lease which was renewed the following year and again on May 1, 1943 for a period of one year. During the period from May 1, 1941 until the date of the occurrence plaintiff and members of her family were in continuous possession and control of the apartment in question. Plaintiff testified substantially as follows: Some time during the month of February, 1943 she "noticed five or six tiles loose just south of the edge of the wash basin in the bath room." About two and a half months before the accident she took the tiles out of the floor in the bath room and put them in a bag. Thereafter some of the cement in which the tiles were embedded loosened, causing a "hole or depression." On October 3, 1943 she was washing some clothes in the wash basin in the bath room and as she stepped back into the hole made by the removal of the loose tile and cement she lost her balance and fell.

At the time she fell the bath room was illuminated by a sixty-watt electric light which was located over the wash basin.

Defendant's main contention is that a landlord is not liable for injuries on the premises leased to a tenant and under the tenant's control.

There is no duty on a landlord to make repairs of a leased apartment unless he has assumed such duty by express agreement with the tenant. (Breazeale v. Chicago Title & Trust Co., 293 Ill. App. 269; Cromwell v. Allen, 151 Ill. App. 404; Margolen v. deHaan, 226 Ill. App. 110.) In the instant case the lease in effect at the time of the occurrence, as well as the preceding leases, contained provisions that lessees would keep the premises in good repair and that the lessor would not be liable for any damages resulting from failure to keep them in repair.

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The evidence discloses that the condition complained of existed for about four months prior to the occurrence. Although the complaint alleges that the defendants rented the premises with knowledge that a dangerous condition existed, the plaintiff's testimony shows she also knew of it and that the condition became progressively worse by constant use of the premises. There was no evidence of concealment or fraud by the landlord as to some defect known by him and unknown to the tenant.

Application of the rule as announced in the foregoing authorities bars plaintiff from recovery. In our opinion the court erred in denying defendant's motion for a judgment non obstante veredicto.

For the reasons stated, the judgment here appealed from is reversed.

JUDGMENT REVERSED.

KILEY AND BURKE, JJ. CONCUR.

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WEST TOWN REAL ESTATE CORPORATION,)
Appellant,)
v.)
FRANK E. WILLETT,)
Appellee.)

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

331 I.A. 109

MR. PRESIDING JUSTICE LEVE DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer by plaintiff lessor to recover possession of the first floor of the premises commonly known as 4456 West Monroe Street, Chicago, because of defendant lessee's alleged violations of the covenants in the lease. There was a trial before the court without a jury and judgment in favor of defendant. Plaintiff appeals. No reply brief has been filed by defendant.

The lease is dated August 5, 1945 and demised the premises for a period of one year commencing October 1, 1945. The pertinent provisions read as follows: "C lause 3. Said premises shall not be occupied in whole or in part by any person other than lessee, and lessee shall not sublet the same or any part thereof Clause 4. Said premises, or any part thereof shall not be used or occupied for boarding or lodging house, nor for rooming purposes Clause 14. In case of the breach of any covenant in this lease contained lessee's right to the possession of the demised premises shall thereupon terminate without notice or demand, and the mere retention or possession thereafter by lessee shall constitute a forcible detainer, and if the lessor so elects this lease shall thereupon terminate and upon the termination of the lessee's right of possession as aforesaid lessee agrees to surrender possession of the demised premises immediately"

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

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Journal of Management Education 30(6)p. 789-804

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

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1. The first group of people who are interested in the study of the history of the world are the historians. They are people who study the past and try to understand what happened and why it happened. They use a variety of sources, including books, documents, and artifacts, to reconstruct the past. They also try to understand the people who lived in the past and how they thought and felt. Historians are interested in the history of the world because it helps them to understand the present and the future.

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7. The following information is provided for the year ended 31/12/2014:

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The record discloses that the defendant, called by plaintiff as an adverse witness, testified that at the beginning of his tenancy under the lease he resided in the premises with his wife, his son Victor, his wife, and their two children. Afterwards on February 4, 1946 defendant's son Victor and his family left the premises. Thereafter the defendant, his wife, his daughter, her husband and three children occupied the premises until the date of the trial. Defendant acknowledged receiving from plaintiff written notice of default in the terms of the lease, in accordance with section 9, of chapter 80 (Landlord and Tenant) Illinois Rev. Stats. 1945, State Bar Assoc. Edition.

Louis Zimmerman, called by the plaintiff, testified in substance that he is president of the plaintiff corporation; that he visited the premises in question frequently; that on February 4, 1946 "at least eleven other persons" occupied the demised premises. On direct examination defendant denied that "at least eleven other persons" occupied the premises. It is conceded by plaintiff that lessee paid the rental due.

Plaintiff's principal contention is that the lease may be terminated for default in any of its terms and the lessor may reenter and take possession.

In his brief plaintiff's counsel asserts that he served a notice upon the defendant in conformity with statutory and CPA requirements, notifying him of the default and demanding that he cease the violation within ten days.

Section 6 (d) (1) of the Rent Regulation for Housing provides that "Every notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground under this section upon which the landlord relies for removal or eviction of the tenant and the facts necessary to establish the existence of such ground.

the date of the report.

It is noted that the report

was dated 10/10/55 and that

the report was made by

the person named in the report.

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the person named in the report.

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A written copy of such notice shall be given to the Area Rent Office within twenty-four hours after the notice is given to the tenant."

Section 6 (d) (2) provides that "At the time of commencing any action to remove or evict a tenant the landlord shall give written notice thereof to the Area Rent Office stating the title of the case, the number of the case where that is possible, the court in which it is filed, the name and address of the tenant, and the ground under this section on which removal or eviction is sought."

We have made a careful examination of the record. It does not show that plaintiff complied with section 6 (d) (1) requiring notice to the Area Rent Office, nor does it appear that plaintiff (landlord) gave written notice to the Area Rent Office stating the title of the case, the number of the case, the court in which it was filed, and the name and address of the tenant, as required by section 6 (d) (2).

The purpose of the foregoing regulations is to enable the Area Rent Office effectually to aid in the enforcement of the Act. The Regulations are binding on the tenant as well as the landlord, and the tenant is not permitted to waive the giving of the notice by the landlord. (222 East Chestnut Street Corporation v. Murphy, 325 Ill. App. 392, 407.)

Proof of compliance with the foregoing Rent Regulation for Housing by plaintiff is indispensable to maintain his cause of action. This proof does not appear in the record. Plaintiff's bare statement in his brief that he conformed to the OPA requirements is insufficient. This court cannot presume that the Regulations were complied with, since presumptions unfavorable to a judgment will not be indulged for the purpose of reversing it. (3 Am. Jur. Sec. 953, p. 516.)

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within twenty-four hours after the receipt of
Section 6 (1) (2) of the Act of 1911
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We are impelled to affirm the judgment because the record fails to show a compliance with the Rent Regulation for Housing, as hereinabove stated.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

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MRS. S. RAYMER,

Plaintiff - Appellee,

v.

LIBERTY NATIONAL BANK, as Trustee,
TILLIE SIGLIN, LEON SIGLIN and I.
BRANDZEL,

Defendants,

LEON SIGLIN and I. BRANDZEL,

Defendants - Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

331 I.A. 110

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed in the Municipal Court of Chicago, Mrs. Sadie Raymer sought a judgment against the Liberty National Bank, as Trustee, Tillie Siglin, Leon Siglin and I. Brandzel for personal injuries suffered on February 1, 1944 in the basement of the premises at 4940 North Kimball Avenue, Chicago. On plaintiff's motion the court dismissed the bank, as trustee, and Tillie Siglin. The defendants filed a "defense" denying that they were negligent, or that plaintiff was in the exercise of due care for her own safety. A trial before the court and a jury resulted in a verdict against the remaining defendants, Leon Siglin and I. Brandzel, for \$350. Motions for a directed verdict, for a new trial and for judgment notwithstanding the verdict were denied, and judgment was entered on the verdict. Defendants appeal. Plaintiff did not file a brief in this court.

Plaintiff had been a tenant in the building for 14 years. In the basement wash tubs were provided for the tenants for laundry purposes and sheds or lockers were provided as store rooms. The laundry tubs were located in the rear and the lockers or sheds toward the front of the basement. The basement, with a cement floor which slanted for the purpose of drainage, was about 13 feet wide and had a row of supporting steel posts. These were

spaced about 7½ feet apart, standing approximately 3 feet from the side of the basement along which the lockers were located, and approximately 10 feet from the opposite wall. The posts were constructed in accordance with the usual and customary standards of construction in that type of apartment building in Chicago. The footings of the posts were covered with cement risers of varying height, depending on where a post stood with reference to the graduated position of the floor. These risers consisted of cement inclines of about 3½ to 4 inches at the foot of the post.

On Tuesday, February 1, 1944, plaintiff entered the basement at about 7:50 a. m. She turned on the light, removed the washing machine from her locker, and started to move it toward the tubs at the other end of the basement. On previous occasions, in moving the washing machine, she moved it down the 10 foot passageway between the posts and the basement wall. On this morning she observed clothes hanging in the 10 foot section. She also observed an ordinary girl's bicycle chained to the first post in such a manner that it was across the 10 foot passage and practically touched a gasoline station fixture which stood against the wall and extended out some 15 inches. The bicycle belonged to Harriet Siglin, the 17 year old daughter of one of the defendants. Although there was no evidence that Harriet Siglin had placed the bicycle in the obstructing position, if she did, she did so entirely of her own accord and not by instruction from either defendant. The bicycle had been chained to the post in a parallel position, not in anyone's way, on many prior occasions. This was the first time plaintiff saw the bicycle standing across the 10 foot passageway rather than parallel to the line of posts. The bicycle was so placed in a crosswise position without the knowledge or consent of either defendant. Although on other occasions when

clothes were hanging in the 10 foot passageway, plaintiff pulled the washing machine through the clothes, on this morning she did not attempt to move the clothes or the bicycle. While walking backwards, she started to pull her washing machine down the 3 foot passageway between the lockers and the row of posts. After she had moved the washing machine beyond the first two posts and down to the third post, it came in contact with that post, or the cement riser at the bottom. After the contact, it appears that she continued to pull the machine. As a result, the machine tipped at an angle. She was thrown to the floor in a sitting position, causing her injuries.

During her years of tenancy in the building she had been in the basement approximately 500 times. During all of this time she did not complain to the defendants about the condition of the basement, about the presence of a bicycle, or about the presence or location of the gasoline station fixture belonging to one of the defendants.

The first point advanced by defendants is that plaintiff failed to prove that the acts of the defendants were the proximate cause of her injury. In Sycamore v. Chicago & Northwestern Ry. Co., 366 Ill. 11, the court said (16):

"It is a rule, long established and often announced, that liability for negligence must be based upon such relationship between the act and the injury that the act may be said to be the proximate cause of the injury."

In Illinois Central R. R. Co. v. Oswald, 338 Ill. 270, the court said:

"The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which might result from his act. If the negligence does nothing more than furnish a condition by which the injury is made possible and that condition causes an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury."

See also Merlo v. Public Service Co., 381 Ill. 300; Briske v. Village of Burnham, 379 Ill. 193; Moudy v. New York Central R. R. Co., 385 Ill. 446. If we assume that the bicycle obstructed the passageway, that act merely caused a condition providing an opportunity for other causal agencies to act. Plaintiff did not come in contact with the bicycle. The bicycle, in the obstructing position, merely caused her to select one of a number of alternate modes of conduct. When she saw the bicycle blocking her usual passageway, she had several choices, namely, (1) she could have moved the bicycle, which weighed considerably less than the washing machine; (2) she could have requested Mr. Siglin, or some other member of his family, to move the bicycle; (3) she could have chosen the alternate route if she was satisfied that the narrower passageway would be adequate; and (4) she need not have moved her washing machine down either route, or at least until she was satisfied that the passageways were clear and safe.

Exercising this free judgment, she decided to attempt to move the washing machine down the 3 foot passageway. The evidence is undisputed that this passageway was adequate for her purpose, since she moved it past the first two posts without any difficulty. When opposite the third post, while walking backward, she so maneuvered the machine as to come in contact with either the post or the cement riser at the bottom, in such a manner as to cause the machine to tilt. She does not charge that the basement was poorly lighted, or that the post or cement riser was not visible. The undisputed evidence is that the basement was lighted and that the posts and cement risers were visible. The evidence shows that when plaintiff had pulled her washing machine so that it came in contact with the post or riser, she did not stop her action, but apparently continued to pull the machine, which caused it to tilt.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-19-2010 BY 60322 UCBAW

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

1. The following information was obtained from the above mentioned sources:

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THIS IS NOT TO BE USED AS A GUIDE FOR THE PREPARATION OF THE FINAL REPORT

Approved for release by NSA on 08-29-2014 pursuant to E.O. 13526

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and that the majority of the population was of nonwhite background.

CONFIDENTIAL

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Classification and Control of Data on Criminals and Delinquents

WISCONSIN - 1960; Madison and other cities. 1960-1961, mostly in deep salt flats.

• 2.13 of 21 October 1944, ordered the firing of demolition

Before plaintiff made her decision to use the alternate route, she was not in any danger because of the position of the bicycle. The injury was proximately caused by her decision to move the machine down the alternate route, by walking backward and striking the post or cement riser, both of which were visible, and by continuing to pull the machine after it had come in contact with the post or riser, all of which acts were independent intervening agencies. The record is devoid of any evidence of negligence other than the location of the bicycle. There was no evidence that the placing of the bicycle was the proximate cause. Ordinarily, the question of what is proximate cause is one of fact for the jury. Whether there is any such evidence, is a question of law. There is no evidence that the defendants were negligent, or that the obstructing position of the bicycle was the proximate cause of plaintiff's injuries. In that state of the record it was the duty of the court to direct a verdict, or to enter judgment notwithstanding the verdict.

We agree with the statement of the defendants that the happening of an accident raises no presumption of negligence on the part of a defendant. Rotehe v. Buick Motor Co., 358 Ill. 507; Huff v. Illinois Central R. R. Co., 362 Ill. 95; Lewis, et al. v. Checker Taxi Co., et al., 318 Ill. App. 71. Defendants also argue that plaintiff, having failed to prove she was in the exercise of due care for her own safety, is not entitled to recover; (Dee v. City of Peru, 343 Ill. 36,) that the law charges a person with the duty of seeing that which is clearly visible and within range of vision; (Greenwald v. B. & O. R. R. Co., 332 Ill. 627;)(Dee v. City of Peru, supra.) that the defendants, as landlords, are not liable for injuries sustained by a tenant unless they had actual or constructive knowledge of the condition causing the injury; that

plaintiff did not prove that either defendant placed the bicycle in an obstructing position, or that they had actual or constructive knowledge thereof; (Kahler v. Marchi, 307 Ill. App. 23,) and that a parent is not liable for the tort of his minor child merely from the relationship. (Arkin v. Page, 287 Ill. 420; Dick v. Swenson, 137 Ill. App. 68.) As our views on the first point dispose of the case, we will not extend the opinion by discussing the other points alleged.

The judgment of the Municipal Court of Chicago is reversed and judgment notwithstanding the verdict is entered here for the defendants, Leon Siglin and I. Brandzel, and against the plaintiff, Mrs. Sadie Raymer.

JUDGMENT REVERSED AND JUDGMENT HERE.

LEWE, P.J. AND KILEY, J. CONCUR.

43932

GEORGE J. JAGEMANN,

Appellee,

v.

PERCY REID McMAHAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

331 I.A. 110²

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On November 14, 1945 George J. Jagemann filed a statement of claim in a forcible detainer action in the Municipal Court of Chicago against Percy Reid McMahan, alleging that he is entitled to the possession of an apartment which the defendant unlawfully "withholds" from him. A trial before the court without a jury was begun on November 26, 1945 and continued to March 1, 1946. On February 28, 1946 the court found the defendant guilty of unlawfully withholding possession from the plaintiff and entered judgment accordingly. On March 1, 1946 the judgment was vacated and the cause was set for "hearing" on March 6, 1946. The record of the proceedings of March 11, 1946 recites that the case came on for trial and that the court, having heard the evidence and the arguments of counsel, and being fully advised in the premises, entered judgment for plaintiff.

On March 15, 1946 defendant moved that the judgment entered on March 11, 1946 be vacated. This motion was supported by defendant's affidavit stating that he is a minister of the gospel; that the rent for November and December, 1945 and January, February and March, 1946 was paid to plaintiff by means of checks mailed to plaintiff by the treasurer of the church of which defendant is the pastor; that the checks were accepted by plaintiff; and that by accepting the rent plaintiff recognized the defendant as a tenant and waived any claim that defendant had committed or

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DATE: 11/15/2001

as a tenant and waived any claim that he had not been notified of the hearing and that he was not present at the hearing. The court found that the defendant had been notified of the hearing and that he was present at the hearing. The court also found that the defendant had waived any claim that he was not notified of the hearing and that he was not present at the hearing. The court entered judgment for the plaintiff.

was committing a nuisance. On March 15, 1946 the court granted a "new trial". On April 1, 1946 plaintiff filed a verified petition to vacate the order entered March 15, 1946, stating that on November 26, 1945, when the case was on trial, the trial judge continued it to March 1, 1946 "for the purpose of enabling the defendant to obtain other living quarters and to avoid entering a judgment for possession against the said defendant, because of the fact that he was a minister of the church." The affidavit further states that the trial judge also instructed the defendant to pay the rent for the time that he occupied the premises; that plaintiff should accept the rent; that in the event defendant vacated the premises by March 1, 1946 he, the trial judge, would dismiss the suit; and that thereafter plaintiff received checks for the rent from the treasurer of the church, which checks were "cashed" by plaintiff. Defendant filed an answer to plaintiff's petition, denying some of the allegations and asserting that the petition did not set up grounds for vacating the order or for a new trial. On June 25, 1946 the court sustained plaintiff's motion to vacate the order of March 15, 1946; whereupon, defendant appealed.

From the transcript of the testimony it appears that the trial was commenced on November 26, 1945. The premises involved are the second floor six room apartment at 4730 West Van Buren Street, Chicago. Plaintiff lives on the first floor and defendant lives on the second floor. Plaintiff attempted to make out his case on the theory that defendant was committing or permitting a nuisance. Plaintiff's wife is suffering from a heart ailment and he sought to show that the defendant, or persons visiting him, stamped on the floor, made loud noises, ran back and forth, bounced a ball, played basketball and went down to the basement and opened the draft in the furnace, allowing it to overheat; that the defendant failed to close the draft; and that because of defendant's misconduct there was grave danger of the house catching fire.

While Mrs. Kale Robertson, a witness for plaintiff, was being cross-examined by defendant, he interrupted by saying that he wished to deny that there was any ill feeling on his part against plaintiff. He stated further that he and his family had always acted in good faith while occupants of the premises; that it had come to his notice that plaintiff had difficulty with previous tenants of the premises; and that he would be happy to move if he could find a place to go, "but that seems to be an utter impossibility." The court then stated: "Well, I am going to continue this case until about March 1st of next year and by that time you will be able to find a place that will be suitable for yourself and family. There will be no order entered; just a straight continuance and no record of any kind against you whatever. You will have until March 1st next to find a place." The attorney for plaintiff then asked if the court would not set the case for around January 1st. The court replied: "This case will be continued as I have stated until March 1st next to give the defendant an opportunity to find a place to move to." It will be observed that at the time the court decided to continue the case, plaintiff had not announced that he rested his case. Defendant, of course, did not have an opportunity to introduce any testimony.

The transcript of the proceedings on March 11, 1946 shows that the attorney for plaintiff stated that the case was continued to March 1, 1946 "with the understanding that the defendant would find a place to move to." This attorney also stated that the court had done "more than justice in this matter"; that he told the attorney for defendant that if a judgment were entered, he would be willing to stipulate that if the defendant vacated the premises before May 1, 1946 that the judgment would be vacated and the suit dismissed so there would be no record against defendant. The attorney

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for defendant asserted that no testimony had been introduced on behalf of the defendant and that he wished to introduce testimony. Immediately following this statement, the court said: "What about moving May let?" The attorney for defendant stated that defendant would be happy to move, but that he could not locate an apartment for himself and family. Defendant's attorney then renewed his request that he be permitted to introduce testimony. The court declined to permit him to do so.

Defendant maintains that he did not have his day in court because the trial judge did not permit him to introduce testimony. Plaintiff's theory is that he and defendant entered into an oral stipulation in open court by which he agreed that if he did not vacate the premises within 90 days, judgment would be entered against him for possession; also, that substantial justice has been done between the parties. The record shows that while the case was on trial on November 26, 1945, the defendant was vigorously opposing the action. The course of the examination, cross-examination and the remarks of the attorneys for the parties shows that the defendant was resisting the charges being pressed by plaintiff. Neither party asked for a postponement. The court continued the case until March 1, 1946. From the remarks of the court, it is apparent that he hoped that defendant would be able to find another apartment for himself and his family before the case came on for trial again. However, defendant did not, by word or action, state that he would move if he could not obtain another apartment. It was his position that he had a right to remain in the apartment. There is no stipulation by defendant or his attorney that he would move. It was the duty of the court to decide whether plaintiff was entitled to possession in accordance with the law applicable to the evidence presented in the trial. It is apparent that when the matter again came on to be heard on March 11, 1946, the court felt that the defendant had been given sufficient time in which to secure another

Defendant had been given sufficient time to prepare his defense. It is noted that the trial was held on March 11, 1948, and the case on to be heard on March 11, 1948. The court found that the defendant was not given sufficient time to prepare his defense. The court also found that the defendant was not given sufficient time to prepare his defense. The court also found that the defendant was not given sufficient time to prepare his defense.

apartment, and that hence judgment should be entered in favor of plaintiff. In the absence of a stipulation, the court did not have any authority for adopting this procedure. The court erred in denying defendant the right to introduce testimony. Although the common law record states that the court heard the evidence and was fully advised in the premises, the transcript in the record shows that defendant was not permitted to introduce testimony.

There is nothing in the record to show that plaintiff made any attempt to comply with the rent regulation for housing adopted under the provisions of the Emergency Price Control Act. This regulation is reported in the Federal Register and we take judicial notice of it. There was no attempt to show that 10 days' notice was given to the tenant to surrender possession, and that a written copy thereof was given to the area rent office within 24 hours after it was given to the tenant, as required by Sec. 6 (d) (1) of the rent regulation for housing; nor does it appear that at the time of commencing the action a written notice was given to the area rent office stating the title and number of the case, the court in which filed, the name and address of the tenant and the grounds on which eviction was sought, as required by Sec. 6 (d) (2) of the regulation. Without the giving of these notices, plaintiff could not prevail. See 222 East Chestnut Street Corp. v. Murphy, 325 Ill. App. 392.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded for further proceedings not inconsistent with these views.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

LEWE, P.J. AND KILEY, J. CONCUR.

43254

ELISABETH F. MILLS,

Appellee,

v.

WILLIAM SUSANKA,

Appellant.

APPEAL FROM

CIRCUIT COURT

COUNTY OF COOK.

331 I.A. 111

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action in chancery to compel the retransfer to plaintiff of 15 shares, the controlling segment, of the Capital stock of the Pabst Pharmaceutical Corporation. A decree favorable to plaintiff was entered pursuant to a Master's Report. On appeal this court decided that on the facts found by the master in chancery, plaintiff and Susanka were equally guilty of fraud in the transaction and that plaintiff was, accordingly, precluded from aid in equity. Mills v. Susanka, 327 Ill. App. 367. The Supreme Court reversed our decision and remanded the cause to this court with directions to decide the question whether Defendant Susanka made a bona fide purchase of the stock. The People v. Fair, 394 Ill. 439.

In 1909 Edmund Pabst entered the patent medicine business. Before 1931 he operated the business under the name of Pabst Chemical Company, Not. Inc. In 1931 he was indebted to three of his children and Susanka. In October of that year Attorney Berglund organized the corporation pursuant to the agreement of Pabst and these creditors. Pending the re-organization the assets of the company were given in trust to Rose Schneider, Pabst's employee. The corporation was capitalized at \$25,000. Susanka canceled his debt in exchange for 240 shares, or 48 percent of the corporate stock valued at \$12,000 and a corporate note for about \$3,600. The

balance or 52 percent of the stock being 260 shares valued at \$13,000 issued to the Pabst children who were creditors. This included plaintiff who received 100 shares.

In March 1932, Red Star Laboratories commenced suit against Pabst in the Federal Court for damages arising out of a violation of the copyright laws. The trial began in December 1936. A verdict for \$25,000 was rendered January 2, 1937 against Pabst. The verdict included a finding against him upon a malice count. Judgment was entered January 16th. October 20, 1937 Red Star Laboratories commenced a creditor's suit against Pabst and the stockholders of the corporation. Pabst died November 18, 1937.

The verdict in the copyright case was expected January 2. A hurried stockholders' meeting was held in the Company offices that morning. Plaintiff was not present, having been delayed in Minnesota. Susanka could not leave his gas station to attend. Hicks, an employee of the Company, suggested that Susanka be made a majority stockholder. Those at the meeting went to Susanka's gas station. They were accompanied by Attorney Berglund. After a lengthy discussion an agreement was made to attain the object suggested by Hicks. Under the agreement plaintiff surrendered her certificate for 100 shares. Two new certificates issued, one to plaintiff for 85 shares and one to Susanka for 15 shares. He had also received a certificate for one share from Pabst. Susanka, thereupon, became the holder of 256 shares. He delivered to plaintiff a note and a check, each for \$375. The check was cashed and the proceeds returned to him. The note was not paid. At the trial plaintiff tendered the note and Susanka tendered payment of the note. Each refused tender.

The master found that on the evidence before him there was not a bona fide sale. The chancellor confirmed the master's report and entered a decree accordingly. The master's conclusions on facts, therefore, will not be disturbed unless manifestly against the weight of the evidence. Newman v. Youngblood, 394 Ill. 617.

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The decree impressed a trust upon the 15 shares in controversy and ordered their transfer to plaintiff. In default of the transfer the decree provided for the cancellation of the certificate representing the 15 shares and the issuance of a new certificate for 100 shares to plaintiff. The decree was based upon conclusions of the master that under the agreement of January 2, Susanka was to hold the stock until after danger of the creditors' bill was passed and then immediately reassign it; that Susanka was the moving spirit in the transaction; that the sale was merely colorable; and that the purported consideration a sham and that it was not intended that plaintiff receive any consideration.

These findings of fact rested upon subordinate findings that Hicks advised Pabst to bring about the transfer of the stock to Susanka; that Berglund told Susanka the corporation was legally organized, that the stock holdings were bona fide and there was no reason for fear on Susanka's part, and that if his fears were justified the transfer would not remove the shares from the reach of creditors; that to give the appearance of legitimacy, the check and note were given with the understanding that the proceeds of the check would be returned to him and the note not paid; that Attorney Berglund took no part in the agreement; that Susanka informed Hernandez, who returned the proceeds of the check, that the sale was fictitious; that in November 1938, Susanka, pursuant to his scheme to give color to the transaction induced Rose Schneider to have plaintiff demand payment of the note and that in December, Rose Schneider protested the giving to Hicks one of the 15 shares on the ground that the stock was plaintiff's; that in March 1939 Susanka rejected the demand of Pabst's widow on behalf of plaintiff for return of the stock unless the Pabsts bought all of his stock and paid the corporate note; ^{and} that in the month of May following, Pabst's son made a like demand and was told by Susanka that the

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Pabst had control long enough and that he wanted \$22,000 for his interest.

Susanka filed objections to the report. They were overruled and stood as exceptions in court. Presumably they were argued before the chancellor. They were overruled. The substance of the exceptions is that the master should have found that the January 2nd meeting was arranged by Pabst in the interest of himself and his family; that Susanka was solicited to make the purchase and that he did so without any agreement to re-transfer, and that any agreement to that effect was deferred for writing in case the Pabsts should desire such a contract; that plaintiff received full consideration, recognized the sale as valid and demanded payment of the note; that the check was cashed and the proceeds returned at the suggestion of plaintiff's associates pursuant to the Pabst's plan to defraud the creditors of Pabst; that Attorney Berglund took part in all transactions and advised those present that only a bona fide sale would stand against a creditor's bill; and that Hernandez' testimony as to the fictitious sale was unreliable. These exceptions present the substantial issues of fact.

We think there is no question but that both parties acted with full knowledge that the purpose of the transaction was to place the stock beyond the reach of the creditor's bill. This motive in itself would not preclude a bona fide sale. It and the admitted fact that an option to repurchase was more or less understood bear on plaintiff's contention. We think that the terms used by those involved in the transaction and by the parties, are not helpful in determining precisely what the nature of the transaction was. These terms range from "transfer", through "sale" to "agreement of trust".

We believe one point is decisive against a finding that the sale was bona fide. Susanka says in his testimony that the proceeds of the check were returned to him because he refused to pay more than \$25 per share for the stock. In his brief he argues that the consideration was \$750 or \$50 per share. Hicks who was a witness for Susanka says this part of the transaction was "confusing". He never determined whether the returned proceeds were to be a loan from plaintiff to Susanka or a "kick back as the saying goes." The note was never paid. Susanka says a letter from plaintiff - after the creditor's suit was disposed of - demanding payment, shows that the intention was that it should be paid. Rose Schneider says that she asked plaintiff to make the demand at Susanka's request. Plaintiff says that she wrote the demand at the request of Rose Schneider. Susanka denies that he requested the demand be written. We think the finding that paying of the consideration for the 15 shares was not intended by the parties, was justified. We believe that neither plaintiff nor Susanka intended when the transaction was consummated that he should pay the note or that she was loaning him the proceeds of the check. It is our view that the finding that the sale was not bona fide is not against the manifest weight of the evidence. We see no merit, therefore, to the contentions of Susanka based upon novation or rescission.

We see no necessity of going further. There being no sale, Susanka should not be permitted to keep plaintiff's stock. We, therefore, affirm the decree.

AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

43755

ALLIED BEAUTY PRODUCTS MANUFACTURING
COMPANY, a corporation,

Appellant,

v.

CHEMICAL BORINGS COMPANY OF AMERICA,
a corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

331 I.A. 112

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit for damages arising out of a sale of iron filings by sample. Trial was before the court without a jury. Judgment was for defendant and plaintiff appeals.

Plaintiff manufactured machineless pads for use in permanent waving of hair. A pad consisted of an envelope 2 inches by 1½ inches containing a mixture of metal filings and chemicals according to a formula. The envelope made of foil or composition paper was perforated on one side. The mixture in the envelope was potentially hot. The heat was produced by placing a moist absorbent paper against the perforated side of the envelope. A special absorbent paper was supplied by plaintiff with the pad. In use the pad and absorbent paper were wrapped about the hair and clamped. Normally a pad quickly heated to 210 degrees, Fahrenheit, gradually increased to 245 degrees and then decreased to 212. This process lasted 8 or 9 minutes so as to make the wave.

The proof shows that before the Spring of 1943, plaintiff used aluminum filings in its mixture; that in the Fall of 1941 with knowledge of plaintiff's purpose, defendant furnished a sample of iron filings; that plaintiff thereafter purchased three shipments totalling 25,000 pounds on the express direction that the material conform to the sample; that the material was used in making pads; that though the material, ⁱⁿ the first shipment of 10,000 pounds, ^{that in} conformed to the sample, the second shipment did not and its use

conformed to the sample, the second reference is not the one that in that though the material is the same and not of the same.

rendered the pads made from it unfit for retail trade; and that as a result plaintiff was damaged to the extent of \$23,180.19. It is our view that the foregoing proof was sufficient to make out a prima facie case for plaintiff. The court properly denied defendant's motion for a finding in its favor at the close of plaintiff's case.

Plaintiff argues that since its prima facie case was established it was error to enter judgment against it in the absence of rebutting evidence. Prima facie proof is that, which standing alone, unexplained or uncontradicted is sufficient to maintain the proposition offered and if not rebutted remains sufficient for that purpose. People v. C. V. & C. Ry. Co., 249 Ill. 97. Denial of defendant's motion however, did not necessarily entitle plaintiff to recover even though defendant's proof alone may have been insufficient to overcome the prima facie case. Curtis v. Kaderbek, 381 Ill. App. 471. The court in its final decision was required to consider whatever competent evidence was produced in plaintiff's case as well as defendants.

Plaintiff's evidence showed that when the three shipments in 100 pound bags were received by it, the bags were stored in its garage. The 100 bags of the first shipment were used in about two months. Ninety bags of the second shipment had been used when the third shipment arrived. About ten days later rust was discovered in the remaining bags of the second and in the bags of the third shipment. The rust indicated that the material was too highly oxidized for use by plaintiff. Its manufacture required a minimum of oxidation. Upon notice, defendant's agent said the defect was not "intentional", took back about 60 bags and duly credited plaintiff therefor.

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Plaintiff concedes and the proof tends to show that the first shipment was satisfactory. Plaintiff's president and its chemist tested the material in the first and second shipments before, during and after manufacture. They tested "very good." Since each of these shipments was used approximately two months, the inference is that the tests were made during those periods.

Pads made from the second shipment were returned as unfit. Out of 6,500,000 pads made through use of defendant's material 1,220,000 were returned. Since there was no abnormal return of those made from the first shipment, it would appear that probably somewhat less than 50% of the pads made from the second shipment were returned. Plaintiff caused an analysis to be made of a sample of the second shipment after the returns were made. The test showed iron oxide of 9.3%. Iron oxide content of 5% is the maximum for effective use in plaintiff's product. Normally pads, through gradual oxidation, are ineffective after a year or so. Defects in pads because of excess iron oxide should appear within a month after manufacture. The sample which defendant gave plaintiff in the beginning tested, after four years, 2.3% iron oxide. This sample was unmixed with aluminum filings, as was used in the mixture with the iron filings in the shipments, or with any other ingredients. This sample had been kept by plaintiff in the intervening years in a sealed glass jar and in a container placed in a safe.

The preceding facts appear from the evidence, principally in plaintiff's case. Those presented in plaintiff's case were not properly considered on the motion for a finding by defendant. They were, however, sufficient justification for the court's ultimate finding, even though the court may have given little credence to the testimony of defendant's agent introduced by defendant, and though it may have disregarded as speculative other testimony defendant introduced as to the deficiency in cartons.

Plaintiff needed iron which was not too greatly oxidized so that heat could be generated. Defendant through its agent knew it. The sample it furnished and the first shipment met the need. The second shipment did not and the result was the damage alleged. Its chemist said the second shipment "must have been slightly oxidized when received - not enough to be noticeable." There was testimony that where the iron was excessively oxidized in the beginning the deterioration would progress much faster. There was testimony too that though chemically possible it was entirely unlikely that moisture seeping through the containers and cartons could have caused the damage. Defendant's testimony on these points was that iron filings oxidized to the extent of 7 or 8% are satisfactory for manufacture of machineless pads; that the containers used by plaintiff in shipping were not moisture proof; and that moist atmosphere pressure would cause quicker oxidation.

Where a sale is by sample there are implied warranties that the quality of the bulk shall correspond to the sample, and that the buyer shall have an opportunity to compare the bulk and sample. (Chap. 121½, Par. 16, Ill. Rev. Stats.)

The iron filings were tested by plaintiff and since there was no express warranty, we believe that plaintiff took whatever risk there was in using the material. Telluride Power Co. v. Crane Co., 208 Ill. 218; Herwich v. Brewery Co., 95 Ill. App. 162. The filings were used according to a chemical formula to produce a chemical result. Plaintiff's chemist inspected the filings. There is no showing that in his inspection the filings did not compare in quality with the sample. We infer a favorable comparison was made. We think it unreasonable to expect that defendant should have made a more thorough examination of the bulk than plaintiff's

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chemist. Neither can it be said that a more thorough examination would have shown a different comparison. Moreover, upon the facts in this case, we cannot say that the implied warranty of quality of bulk and sample extended beyond the dates of acceptance and use by plaintiff. Burt v. Garden City Sand Co., 237 Ill. 473. Under the circumstances we believe that plaintiff should not recover. Central Commercial Co. v. Lehon Co., 173 Ill. App. 27.

For the reasons given the judgment is affirmed.

AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

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The diagram illustrates the experimental setup. A subject is seated at a table, looking at a video screen. A camera is positioned above the screen. A target is placed on the table. A horizontal arrow indicates the movement of the hand from the starting position to the target. A vertical arrow indicates the movement of the hand from the starting position to the video screen. A horizontal arrow indicates the movement of the hand from the video screen to the target. A vertical arrow indicates the movement of the hand from the video screen to the target.

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CARROLL PROCTOR,

Plaintiff - appellee,

v.

LONG TRANSPORTATION COMPANY,

Defendant - appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

331 L.A. 112

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury and property damage action. The Long Transportation Company, Fred Olson & Son Motor Service Company and the Trustees of the Chicago Surface Lines were sued. Before trial plaintiff dismissed the Olson Company. At the close of the evidence he dismissed the Trustees. Trial proceeded as to the Long Transportation Company, hereinafter called the defendant. Verdict and judgment were for plaintiff in the amount of \$750. Defendant has appealed.

The accident happened September 22, 1945, about 7 A. M. at the northwest corner of 95th and State streets in Chicago. Plaintiff was driving his 1936 Buick west on 95th Street near the north curb. At State Street he stopped in obedience to the traffic signal light. South of his car, and between it and the raised safety island, another passenger car stopped. When the light changed the other car proceeded west across State Street. Defendant's truck en route from Detroit followed the other car in the same lane and attempted to cross State Street. Plaintiff's car also moved forward. As defendant's truck and plaintiff's car moved forward, a street car also moved forward.

There are street car tracks in both 95th and State streets. At the northeast corner curved tracks lead northwesterly from 95th Street into State Street. The street car moved on these curved tracks. It collided with the truck, forced it against plaintiff's car, pinning it against a wooden post near the corner.

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Plaintiff alleged that the defendant's truck was being operated at the time by J. Diggs of Detroit. Defendant filed its Defense November 26, 1945, denying all of plaintiff's allegations. The next pleading which appears in the record is an affidavit filed, by Attorney Hubbard for the defendant, on April 1, 1946 in the office of the Municipal Court Clerk. The original affidavit, of which the one referred to is a copy, was offered in support of defendant's motion for a continuance on April 1st, when the cause came on for trial. It stated that Attorney Hubbard had investigated the whereabouts of "Diggs, the driver of the truck," involved in the accident; that he had located Diggs who was no longer employed by the defendant; that there had not been sufficient time either to bring Diggs from Detroit for the trial or take his deposition; and that Diggs was an important and material witness, without whom defendant could not go to trial. It further stated that Diggs, if present, would testify that "I was the driver" of the truck and was involved in the accident; that "I was driving" the truck west on 95th Street; that "when we approached State Street" another automobile preceded the truck and "I followed this car west;" and that "I reported the accident to the police."

The plaintiff rested after putting in his case which described the accident substantially as we have done hereinabove.

Page 42 of the transcript of the testimony, which is page 85 of the record, shows that when the defendant's case was to proceed, Attorney Hubbard stated that he had additional facts and would like to amend the affidavit which "I filed this morning." Plaintiff's attorney upon the court's stating that the affidavit was simply what Attorney Hubbard understood Diggs would testify to, said he had no objection. This was out of the presence of the jury. The amendments were made in ink on the face of the original affidavit. The affidavit appears, commencing at page 5 of the transcript, or page 44 of the record. The record states that the inked amendments were "afterwards written." This means they were written after the

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affidavit was presented and after plaintiff had rested his case. The copy filed in the Clerk's Office is fully typewritten as amended.

There is no reason given for the amendment of this affidavit. It was not introduced in evidence. It formed no part of the Defense to plaintiff's statement of claim. Defendant's attorney stated that the amendments were made pursuant to additional evidence which had come to his attention since the trial commenced in the morning.

After amending the affidavit defendant presented its case. It proved that Diggs was the driver assigned to the truck on the day in question; that he was driver when the truck left Detroit; and that no one else was authorized to drive the truck and that he had no authority to use another driver. Defendant concedes plaintiff was in the exercise of due care and admits ownership of the truck at the time.

A witness Taylor testified that he observed the accident. His testimony tended to throw blame on the operator of the street car. He said the driver of the truck asked his name, but said he did not know the driver's name. A witness Porter, a chauffeur, testified he had been in Detroit seeking a job with defendant; that he was unsuccessful and was given permission by defendant's Detroit manager whose name he did not know, and rode to Chicago in the truck; that on the way the driver asked him to operate the truck and that he was driving when the accident occurred. He testified, "I can't think of the name of the driver." And again, "Diggs was his name", and "I can't think of his name, Dixon or something like that." He further said, "I believe I did give my name to the police; if they asked me. I am not saying if I did, or I didn't. I say I don't remember. * * * I was present when Diggs gave his name. I did not hear Diggs announce to the police that he was the driver of the vehicle. The police did not ask who the driver was."

Plaintiff introduced no rebuttal testimony. There was no testimony in his case in chief as to whom the driver of the truck was. There are suggestions but no proof that Diggs told police that he was driving at the time of the accident. Plaintiff's Plain/brief contains suggestions that he was surprised by the turn of events during the trial. The record does not show he sought the intervention of the court to protect his case from prejudice because of surprise. Defendant urges us to reverse the judgment without remanding the cause on the ground that the uncontradicted proof shows the driver of the truck at the time of the accident was not its agent.

As grounds for reversal and remandment, defendant contends that the court erred in refusing to grant a new trial upon a showing by defendant that it had discovered evidence of plaintiff's settlement with the Surface Lines; that the court erred in refusing to grant a new trial on the ground that plaintiff's counsel had argued improperly to the jury; that there was no competent evidence of plaintiff's damages; and that the court erred in refusing to instruct the jury on the question of agency.

We have already shown that defendant relied on the defense that its agent was not the driver at the time of the accident. It introduced evidence under this defense. It offered an instruction stating substantially that if Diggs had no authority to entrust the driving of the truck to Porter, and if Porter at the time of the accident was driving the truck and was not defendant's servant, the jury could not find defendant guilty even though it found Porter guilty of negligence. No other instruction on the question of agency was given to the jury. We think the refusal of the court to instruct the jury upon the theory of defendant's defense was reversible error. Thomas v. Chicago Embossing Co., 307 Ill. 134; 53 Amer. Juris, pp. 487, 500.

Despite what we have said with respect to the deficiency in plaintiff's case on the question of agency, we believe this case should be retried. In aid of a new trial we point out that proof of damages was in one respect incompetent and in others indefinite and unsatisfactory.

We also point out that plaintiff's counsel in addressing the jury refer to the affidavit offered by defendant in support of the motion for a continuance. This was improper. The affidavit was not in evidence. It was improper also for counsel to argue - when it was not in evidence - that plaintiff's family belonged to a religious sect which did not employ doctors. We think he went too far in referring to the defendant's ability to pay whatever damages would be assessed.

We see no necessity of considering other contentions made.

For the reasons given the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED
FOR A NEW TRIAL.

LEWIS, P.J. AND BURKE, J. CONCUR.

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52-61

Abstract

77-04

Gen. No. 10149. Agenda No. 16.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1947.

331 I.A. 113

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| EDWARD F. GANTAR and FRANK GANTAR,
Plaintiffs-Appellants, |) | |
| |) | |
| vs. |) | |
| |) | |
| JOSEPH F. NASTRUZ, |) | |
| Defendant-Appellee. |) | |
| |) | |
| ANGELO NASTRUZ, |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| vs. |) | |
| |) | |
| EDWARD F. GANTAR, |) | |
| Defendant-Appellant. |) | |

Appeal from
Circuit Court,
Lake County.

WOLFE,-- P. J.

This is a consolidation of two cases, arising out of an automobile accident, which occurred December 17, 1945, on Stewart Avenue, where it intersects Argonne Avenue, in North Chicago. Stewart Avenue is a paved, through highway with stop signs on both sides of the street. Angelo Nastruz, the plaintiff in one case, is the owner of an automobile which was being driven South on Stewart Avenue, by his son, Joseph, and he brings suit against Edward F. Gantar for the damage to his automobile.

In the other case, the plaintiffs are Frank Gantar and Edward F. Gantar. Frank Gantar is the owner of the car, which was being driven east on Argonne Avenue by his son, Edward F. Gantar. Frank

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Gantar sues for damages to his car in the collision. Edward F. Gantar sues for injuries he sustained in the accident.

The cases were consolidated and tried before a jury, who found the issues in favor of Joseph F. Nastruz in the suit brought against him by the Gantars. They returned a verdict of guilty against Edward F. Gantar in the suit brought against him by Angelo Nastruz. The verdict was for \$640.37. A motion by Edward F. Gantar and Frank Gantar for a new trial, was overruled, and a motion for judgment notwithstanding the verdict, was likewise overruled. Judgment was then entered in favor of Joseph F. Nastruz for the sum of \$640.37. It is from this judgment that an appeal has been perfected to this Court.

The appellants have assigned nine errors relied upon for reversal of this judgment. Each and every one of them is substantially the same, and is to the effect that the finding of the jury is contrary to the manifest weight of the evidence. Rose Rygiel testified that she was riding on Argonne Avenue with Edward F. Gantar in the automobile in question; that as they approached Stewart Avenue, Mr. Gantar stopped his automobile for the stop sign; that he then proceeded slowly across the intersection; that as they were about in the middle of Stewart Avenue, the defendants' car approached them rapidly and struck the Gantar car.

Edward F. Gantar testified they were driving along Argonne Avenue, and as they approached Stewart Avenue, he stopped his car, then proceeded slowly across Stewart Avenue; that his car, "was straddling the middle line of Stewart Avenue;" that before he entered the intersection, he looked to the south and looked to the

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north; that he saw a car coming from the north, that he estimated to be 500 feet away, coming in his direction; that it approached rapidly, and he accelerated his speed, but the Nastruz car struck his car on the left side right in the midsection. He also testified as to the injuries he received in the collision.

Joseph F. Nastruz testified that he was driving his father's car south on Stewart Avenue; that as he neared the intersection of Stewart with Nineteenth Street, (which is the same as Argonne Avenue,) he was driving around forty miles an hour, and he had his lights on high beam; that as he was about thirty feet from the Gantar car when he first noticed it enter the highway; that it was to his right on the edge of the highway, and moved slowly; that he swerved his car to the left, but the cars came together right in the center of the intersection; that the front part of his car struck the left side of the other car at about the driver's seat. This is in substance of testimony regarding the collision.

If the jury had seen fit to give more credence to the testimony of Mr. Gantar and his witnesses, they could have found the issues in his favor, but they gave more credence to the evidence of Mr. Nastruz, and found the issues in his favor. We would not be justified in setting aside the verdict of the jury, unless we can say that its findings are against the manifest weight of the evidence. The jury saw and heard the witnesses testify, and was in a better position to test the credibility of the witnesses, and to weigh their testimony, than a court of review. After reading the evidence in this case, we cannot say the verdict of the jury is against the manifest weight of the evidence, therefore the judgment is affirmed.

Affirmed.

In The
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D.1946

7843

C. O. RYBERG,
Plaintiff-Appellee,

vs

CARROL TAYLOR,
Defendant-Appellant

Appeal from Circuit Court
Bureau County

331 I.A. 114

Bristow J.

C. O. Ryberg, present appellee and cross appellant, in this proceeding purchased a one hundred and twenty acre farm in 1936, and controlled the operation of another one hundred acres lying adjacent thereto, which land was owned by his sons. The appellant, Carrol Taylor, was a farmer and stock raiser who had previously farmed the one hundred acre tract. Taylor entered into a partnership arrangement with Ryberg for the farming of the two tracts, the purchasing and feeding of livestock thereon, and the division of the profits on a fifty-fifty basis. Ryberg was to furnish the land and Taylor the labor.

This verbal agreement remained in force from March, 1937 until March 1, 1946. Ryberg sold his land in the fall of 1945, and on December 26, 1945, served upon Taylor a sixty day notice to surrender possession of the premises on March 1, 1946.

Ryberg filed his complaint in the Circuit Court of Bureau County asking for a dissolution of the partnership and for an accounting from Taylor. The defendant answered this complaint by stating that he had entered into a dissolution agreement whereby if the plaintiff sold the land, he was to surrender to him his entire interest in the partnership assets. The defendant asserted therein that he had performed much work, that he had spread lime and manure upon

the land, built fencing, and had made other lasting improvements on the land for which he expected pay, and for which Ryberg had agreed to pay.

The chancellor found the issues for the plaintiff, and decreed that there was due the plaintiff from the defendant the sum of \$3611. Ryberg has filed a cross appeal claiming that the court should have allowed him \$6150.

A reading of the record discloses the following factual picture as it appears to this court. When Ryberg came out to the farm in the fall of 1945, he told Taylor that he had a chance to sell the farm for a handsome price, but that he would give Taylor a chance to buy it first. He offered to sell it to him for one hundred and seventy five dollars an acre, but Taylor said that he could not "swing the deal at such a high figure". The farm later sold for two-hundred dollars an acre. Taylor then, for the first time, asserted his claim that Ryberg owed him for all the improvements he had made on the farm. Later, Ryberg visited the farm when Taylor was ill, and in his bedroom in the presence of Taylor's wife had a conversation regarding a dissolution settlement. It is claimed by Taylor that as a result of what transpired there, Ryberg consented to give Taylor his entire interest in the partnership assets in consideration of the improvement he had made on the farm and in consideration of his giving up possession of the premises peacefully. Ryberg's version of that talk is somewhat different. He asserts that Taylor informed him that the total value of the assets of the farm was five-thousand dollars, and that he, Ryberg, said, "If that is the case, I am willing to make a donation of what ^{hundred} amounts to twenty-five/dollars to settle the deal." Both parties agree that the Court's estimate of value of the partnership property was around twelve-thousand dollars. The Chancellor evidently in arriving at his conclusion in the matter, allowed Taylor \$2500

for his damages, and subtracted that from Ryberg's on-half of the twelve-thousand dollars, which would leave the amount decreed to be due Ryberg.

It is apparent to us that the matter of Taylor claiming anything for his services is merely an afterthought. On his cross examination, the following questions and answers appear: Q. "Did he ever make any agreement with you, that he would pay you if he sold the farm?" A. "Don't know as he ever did." Q. "If he had never sold the farm you would never have made a claim?" A. "Depends on whether or not." Q. "You never kept an itemized account of any labor or work you did for him, because you never intended to charge for it?" A. "Not unless he sold the place."

It is common knowledge that most of the items that make up Taylor's claim are expenses that were advantageous to the partnership, and the actual cost of which was taken from the partnership account. Taylor entertained the delusion that it was his labor that had enhanced the value of Ryberg's farm. Some enhancement in the value of the tract no doubt resulted from stock raising, and the consequent fertilization of the soil. But certainly, the partnership arrangement entered into between the parties hereto did not contemplate that Taylor should be paid for such.

We are of the opinion that the Court was justified in holding that Ryberg never did enter into an agreement surrendering his six-thousand and ~~and~~ dollars in personal property in consideration of a mutual dissolution of their partnership activities. Indeed, we feel that the Chancellor was more than charitable in allowing Taylor a credit of twenty-five hundred dollars. We, therefore, are of the opinion that the decree entered in the lower court is equitable and should be affirmed.

JUDGMENT AFFIRMED.

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Abstract

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GENERAL ^{70.} ~~100.~~ 9532.

ADAMS CO. 13.

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT
FEBRUARY TERM, A. D. 1947.

HOLLISTER-WHITNEY COMPANY,
an Illinois Corporation,
Plaintiff-Appellee,

vs.

W. A. McCALLUM,
Defendant-Appellant.

: C. ADAMS CO. 13. CIRCUIT COURT
: OF ADAMS COUNTY.

33 - 1116 - 2

~~RECEIVED BY THE COURT,~~
~~FILED IN THE RECORDS.~~

HAYES, J.:

The Hollister-Whitney Company filed this action in the Circuit Court of Adams County for a declaratory judgment stating that it did not owe the defendant W. A. McCallum commissions on certain business transactions in which both plaintiff and defendant had participated.

In 1943, Plaintiff, a manufacturing concern, entered into an agreement with defendant whereby defendant was employed on a commission basis to secure business for defendant. The written evidence of this agreement consisted of a letter dated July 8, 1943, signed by plaintiff's president, which stated that in confirmation of a verbal agreement, plaintiff agreed to pay defendant ten percent on all orders secured by defendant outside the state of Michigan, and to pay five percent on all orders secured in Michigan. Receipt

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of this letter was acknowledged by defendant by a letter dated July 14, 1943. It appears that pursuant to this agreement defendant secured a substantial amount of business for plaintiff and was paid his commissions. All of these orders were for war materials.

The dispute in this case arises out of an order for non-war equipment which was obtained by defendant in the summer of 1945. Defendant contends that he is entitled to ten percent commission on all equipment manufactured pursuant to the order. Plaintiff contends that the contract recited above did not apply to non-war work; that defendant, expecting to become a stockholder, director and officer in plaintiff-company, obtained the order on his own initiative with the expectation of profiting as a member of the company; and that he had abandoned the contract of 1943.

E. H. Whitney, plaintiffs' president, testified without objection, that the letter sent McCallum on July 8, 1943 was the result of a conversation in which it was agreed that the defendant's employment was for war-work only. There is evidence also that the war contracts secured by defendant permitted the cost of defendant's services to be charged as part of the price of the equipment; the contract in question here, which was never finally consummated, was based on a formula allowing only fifteen percent for administrative expense, overhead, and profit,--a margin not permitting an outlay of ten percent for defendant's services if a profit was to be realized. The record also discloses that McCallum recognized this and that on numerous occasions he stated that his compensation for this order would have to be re-determined. He had prepared a contract providing for com-

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missions on a sliding scale but did not communicate his plan to plaintiff pending receipt of financial information from plaintiffs' officers which he never obtained. There is further evidence that defendant had an option to purchase a substantial interest in plaintiff company which he never exercised but that an informal agreement existed whereby defendant would be permitted to purchase a large block of stock if the owners thereof decided to sell.

Defendant, on the other hand, contends the letter of July 8, and its subsequent acceptance, constitute an express contract that cannot be varied by parole evidence; that no agreement to terminate this contract was ever made; that while he anticipated that adjustments in his commissions would have to be made, any agreement on his part was conditioned upon receipt of certain information from plaintiff which he never received.

It should be noted that defendant did not object to the admission into evidence of testimony concerning the conversations that preceded the letter of July 8. Since it is properly before us, we are entitled to consider its effect. *Hercules Powder Company v. Kowan*, 245 Ill. App. 291; *Daggett v. Gage*, 41 Ill. 466. We also note that defendant did not deny the substance of those conversations. Moreover while plaintiff did not give defendant formal notice that the contract was terminated, there is evidence that defendant had abandoned it. While defendant contends that abandonment did not occur because no substitute for the July 8 contract had been agreed upon, there is evidence that plaintiff considered the earlier contract did not apply to the order in question here. We therefore hold that the Circuit Court

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was justified in believing that the contract of July 8 related to war-orders only, or that it was abandoned by defendant. While the testimony is conflicting, with each party placing his own interpretation on the events that occurred, the trial court saw and heard the witnesses and there is sufficient evidence to support his judgment on either of the grounds just recited. It therefore must be sustained by this court. *Keefer Coal Co. v. United Elec. Coal Cos.*, 291 Ill. app. 477.

The judgment of the circuit court of Adams County is therefore affirmed.

JUDGMENT AFFIRMED.

Abstract

IN THE
APPELLATE COURT
OF ILLINOIS

Third District
February Term, A.D. 1947

General
No. 9516

Agenda No. 2

3511113

People of the State of Illinois,
Plaintiff-Defendant in Error,) Error to Circuit
vs.) Court of
Kenneth Hopper, alias "Red" Hopper,) Coles County.
Defendant-Plaintiff in Error.)

Wheat, J.

Plaintiff in error, Kenneth Hopper, was indicted by the Grand Jury of Coles County, Illinois, for the second offense of "keeping and operating a common gaming house" in Mattoon, Illinois. He was found guilty by a jury and his punishment fixed at imprisonment in the county jail for one year and assessed a fine of \$1500. Upon denial of motion for new trial, he prosecutes this writ of error.

His first contention is that the trial court erred in ordering him to be personally present at the trial and that this was a violation of his constitutional rights. This issue is identical with that presented in the case of People vs. Matlock, ^{decided by us at this term} ~~ante page~~ and our opinion in that case, adverse to the contention of plaintiff in error, is controlling in this case.

The only other contention made by plaintiff in error is that there is no proof that he is the same person as the one convicted on a similar charge in 1944. The defen-

dant stipulated with the State's Attorney in open court in the presence of the jury, the preamble of which stipulation is as follows: "Mr. Kidwell: Ladies and gentlemen of the jury, it's been stipulated by and between the People and counsel for the defendant, that the defendant Kenneth Hopper, also known as Red Hopper, was on the 30th day of the April Term, A. D. 1944, of the Circuit Court of Coles County, Illinois, arraigned in Court on indictment No. 6075 charged with keeping and operating a common gaming house", and then recited the plea of guilty and sentence of the Court. The following then ensued: "The Court: Is that the stipulation?" "Mr. Cofer: I will stipulate to that fact." Plaintiff in error was ~~bound~~^b by that stipulation and no further proof was necessary.

The judgment of the Circuit Court of Coles County is affirmed.

Affirmed.

Abstract

Gen^{eral} No. 9533

33 3

Appeal from Circuit Court
of Montgomery County.

In this action Plaintiff-appellant, Arintha Hellrung, filed her complaint for divorce on the grounds of cruelty; her husband, John J. Hellrung, by counter-claim, prayed for divorce on grounds of desertion. Upon hearing, relief was denied on the complaint, defendant husband was granted a divorce by reason of his wife's desertion, and he was awarded custody of the couple's eight year old child for the major portion of the year.

The couple was married August 19, 1936. Plaintiff was a member of the Evangelical Reformed Church and defendant was a member of the Catholic Church. Before the marriage, both parties entered into a written agreement that all children born as a result of the proposed marriage should be baptized and educated in the Catholic faith. One child, Thomas, was born of the marriage, October 5, 1937. Disagreements arising out of his custody, rearing, and religious

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training, appear to have been the chief irritants to a happy married life, possibly aggravated by the establishing of a home adjoining that of the husband's parents. A detailed account of these is unnecessary, as the evidence in this divorce case relates to the same period of time as that involved in a prior separate maintenance suit between the parties, the opinion, on appeal, narrating the factual situation and being reported in the case of Hellrung vs. Hellrung, 321 Ill. App. 333. It is sufficient to say that in June, 1941, plaintiff started a habeas corpus proceeding in the City Court of Alton, resulting in an order of June 5, 1941, awarding the custody of the child to the husband. On June 10, 1941, the plaintiff left the home and never returned. On June 16, 1941, she started a separate maintenance action terminating unsuccessfully for her by the decision of the Appellate Court. (Hellrung vs. Hellrung, supra). During the time defendant was in the Navy, from August, 1942, to July 26, 1945, plaintiff had custody of the child. Plaintiff started the divorce action October 4, 1944, charging the defendant with substantially the same acts of cruelty brought out in the trial of her prior separate maintenance suit. Defendant's counter-claim for divorce was filed September 6, 1945, and charged plaintiff with deserting him on June 10, 1941.

As to the findings of the Chancellor that plaintiff was not entitled to a divorce on the grounds of cruelty and that defendant should have a divorce on the grounds of desertion, the evidence is conflicting, but it cannot be said that such findings were manifestly against the weight of the evidence. It needs no citation of authorities to support the principle that a reviewing court has no right to disturb the findings of the Chancellor who has heard the witnesses in open court and has seen them on the witness stand, unless it can be said

that such findings are manifestly against the weight of the evidence.

As to the custody of the child, the decree awarded such custody to the husband for each nine months school year, and to the wife for each three months summer vacation, with monthly payments by the husband of \$40 during such three months. The child was to be in the custody of its mother on Thanksgiving and Christmas of each year. The decree gave each party the right of visitation with the child during the time the custody was in the other, the plan for visitation being set forth in careful detail. No question as to the moral fitness and character of either party has been raised in the case. The question of the best interests of a young child in a broken home can almost never be satisfactorily solved by anyone, whether it be by the parties themselves, a trial court, or a reviewing court. No substitute has yet been found for a harmonious and happy family home for an immature child. The parents of this child are responsible in varying degrees for its unhappy situation. Again, it must be stated that the trial court heard the witnesses and was in a better position than a reviewing court to do something that the parents were unable to do, i.e., provide for the child's custody, welfare, training, and education. An analysis of the decree indicates a considerable sincere and conscientious effort on the part of the trial court to make the best of an unsatisfactory situation. In addition to this, if changing conditions warrant, the court may, from time to time, make additional provisions as to such custody. We do not feel that the decree, in this respect, should be disturbed by this court.

One other question remains. Appellant urges that her husband was not entitled to a divorce on the grounds of desertion

because, in any event, one full year had not elapsed since the termination of the separate maintenance action, (the Appellate Court denying the petition for rehearing, February 23, 1944), and the filing of the divorce suit, October 4, 1944, it being further argued that the pendency of a separate maintenance suit stops the running of the statutory period of desertion as does the subsequent filing of a suit for divorce. While this general rule is announced in the case of Floberg vs. Floberg, 358 Ill. 626, and other subsequent cases, it is qualified by the statement that the litigation of the wife must be bona fide and brought in good faith. This is a question of fact. Although there is no specific finding on this point in the decree, such is unnecessary. (1945 Illinois Revised Statutes, Ch. 110, Sec. 188 (3)). In this case the plaintiff has been persistent in her litigation. She has filed three successive suits on similar grounds, the habeas corpus proceeding, the separate maintenance action, and the divorce suit. Her attitude has been one of persistently refusing to continue the marital status. Her divorce action was filed October 4, 1944, while her husband was still in the Navy, his separation from the service occurring July 26, 1945. Her haste in the matter in filing an action on substantially the same grounds relied upon by her in her unsuccessful separate maintenance suit, does not indicate good faith but rather a studied effort to stop the running of the statutory period of desertion. It cannot be said that the decree was manifestly against the weight of the evidence on the issue of good faith in any of her litigation.

The decree of the Circuit Court will be affirmed for the reasons stated.

Affirmed.

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1946.

SARAH E. HAINER AND ROY HALL,
PLAINTIFFS-APPELLANTS,

v.

GEORGIA RHODES, MINNIE McNEAL,
MAUDE RUCKER, EDITH CLIFFORD,
CATHERINE McGARRY, ANNE WAGNER,
MARY PENNINGTON, MARIE McALLIS-
TER, PEARL GRIGGS AND HERBERT
W. PRAFOKE, EXECUTOR OF THE
LAST WILL AND TESTAMENT OF CHARLES
LES L. HUTCHISON, DECEASED.DEFENDANTS AND APPELLEES,
andHILDA LEE, FANNIE ROSE, LENA POUK
BAKER, ANNE PRENDERGAST AND
MAGGIE NORTH.

DEFENDANTS.

331 I.A. 174

APPEAL FROM THE
CIRCUIT COURT OF
LASALLE COUNTY

Dove, J.

This cause is hereby an appeal from a decree of the circuit court of La Salle County, dismissing for want of equity the complaint of appellants to construe the will of Charles L. Hutchison, deceased. The decedent was the half-brother of appellant Sarah E. Hainer, who is his only heir at law, and appellant Roy Hall is her son. Appellant Roy Hall and all the defendants and appellees, except the executor of the will, are legatees named in the eighth paragraph of the will. Roy Hall is bequeathed a specific legacy of \$2000.00; three others, \$1000.00 each, nine others, \$500.00 each; and two others, \$250.00 each, making fifteen specific legacies, totaling \$10,000.00. The seventh and the

ninth paragraphs are the ones in controversy.

The decedent owned personal property inventoried as being of the value of \$6,542.50, and three tracts of real estate. Of these, the decedent's residence, located in the City of Streator, inventoried at \$3000.00 and all his household goods and furnishings, inventoried at \$290.00 were devised and bequeathed to Sarah E. Hainer. The second tract, a 160 acre South Dakota farm, valued at \$2500.00 was devised to his nephew, Jay Hall. The third tract of real estate is a lot in the City of Streator, reserving coal and mining rights, improved by a large two-story combination warehouse and apartment building partially concrete and hollow tile construction in fair repair, inventoried at \$20,000.00.

The third paragraph of the will directs the executor to pay Sarah E. Hainer, the net income from all the real estate, except the South Dakota farm, and the residence devised to her, until such real estate is sold as provided in the seventh clause of the will. This power of sale relates exclusively to the third tract above mentioned.

The seventh paragraph of the will provides:

"Seventh, I hereby direct and empower my Executor, hereinafter named, to sell and dispose of all of my real estate that is not herein specifically devised, in this my last will and testament, and of which I shall die seized or possessed, at public or private sale at such time or times and upon such term or terms and conditions as he shall deem proper and entirely in his own discretion, and to execute and deliver all proper writings, deeds of conveyances and transfers therefor, and to convey as good a title as I could have done were I living at the time of sale and the purchaser or purchasers shall not be bound to look to the application of the purchase money. It being my wish that my said executor shall dispose of said real estate as soon after my death as he may feel the same can conveniently be sold with proper regard, especially to the fair market value that said real estate should bring upon such a sale but the manner and time of sale shall be entirely within his discretion, and out of the proceeds of the sale of such real estate, after paying all necessary costs and expenses, I hereby direct my executor to pay all of the legacies hereinafter bequeathed to the persons hereinafter named as soon after said sale or sales as the same may conveniently be done by him, and if the proceeds of such sale or sales of said real estate shall not be sufficient to pay all of said legacies hereinafter bequeathed in full, then all of said legacies shall pro-rate among each other so that said legacies may be paid as nearly in full as may be possible from said proceeds of sale. I also empower my executor, if the proceeds of said sale or sales of real estate shall not be sufficient to pay all of said legacies herein be-

which form the basis of the present bill.

The bill is intended to amend the law in relation to

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queathed, to use as much of such other cash as may be on hand in my estate after the payment of claims and costs of administration for the purpose of paying said legacies, otherwise if said legacies can be paid in full from the proceeds of said sale or sales of said real estate such excess cash as may be (on) hand shall become and be a part and parcel of my residuary estate."

The ninth paragraph of the will reads as follows:

"All the rest, residue and remainder of my estate, both real and personal, of whatsoever the same shall consist and wherever the same may be located, including all legacies that may lapse, I give, devise and bequeath in pro-rata shares to all of the legatees named in the eighth clause herein, share and share alike, to be distributed to them in cash in equal proportions and I direct that if any of said legatees should not be living at the time of my death, then only those that are surviving at the time of my death shall take the property in this clause of my will in equal shares."

Appellant claims that because the legacies payable from the proceeds of the land sale amount to only \$10,000.00 with a provision for making up any deficit, if any, from such other cash in the estate as may be on hand, the testator did not contemplate that there will be any excess of the sale money over and above the legacies; that the appraisal shows there will be an excess of about \$10,000; that the testator did not make any disposition of such excess, and such excess will be intestate property, payable exclusively to Sarah E. Hainer, as sole heir at law of the testator.

The claim is wholly untenable, for several reasons. The last sentence of paragraph seven cannot, except by an unwarranted^{and}/unreasonable interpretation, be held to mean that only surplus cash from personal estate is to become a part of the residuary clause. The will gives Sarah E. Hainer the testator's residence, and his household and kitchen furniture. Among other specific legacies, it bequeathes a legacy of \$2000.00 to one of her sons and devises a \$2500.00 farm to her other son. If he had intended her to have any surplus over and above the specific legacies and devises, he would have named her as residuary legatee in the seventh and in the ninth paragraphs of the will. There is no room to construe the ninth clause as meaning that any excess from

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the land sale is to be excluded from the residuary clause. On the contrary, the residuary clause embraces all excess, both real and personal. Hence the claim of appellants that any excess from the land sale retains the characteristics of land, for the purpose of determining to whom it belongs, has no bearing here. There is always a strong presumption against intestacy, and the presumption is that a general residuary clause is intended to include everything not effectively devised or disposed of, unless there is an apparent intention that the property should be excluded from the will. (Carter v. Lewis, 364 Ill. 434; Strauss v. Strauss, 363 Ill. 442, 449.)

The intention of the testator that the legatees named in paragraph eight of the will shall receive the excess from the sale of the property, clearly and unequivocally appears. The cardinal rule of will construction that the intention of the testator is the paramount and prevailing factor, unless it sets up a situation contrary to law, ~~is the governing factor~~, and must prevail here.

The chancellor correctly refused to hold that the ninth paragraph of the will provides for a distribution among the legatees in proportion to the bequests therein given them, or that it would otherwise be uncertain, is equally without merit. The language that the residuary is given "pro-rata" to all the legatees named in the eighth clause herein, share and share alike, to be distributed to them in cash in equal proportions means just what it says, and while the words "pro-rata" are sometimes used when standing alone in the sense claimed by appellants, when used with the other language above quoted they do not have the effect of changing the equal division intended.

The claim that the circuit court should assume supervision

of the sale is without merit. The will itself sets out all the necessary conditions and terms to be observed and empowers the executor to do and complete them in his discretion. We fail to discern any ground upon which appellants are entitled to any of the relief asked by their complaint, including attorney fees. The chancellor was correct in finding that the complaint fails to state any facts showing jurisdiction for construing the will, and in dismissing the same for want of equity. The decree is accordingly affirmed.

Decree affirmed.

JACOB V. GOLD and LEOPOLD M.
GOLD, Co-partners, trading as
NATIONAL MANUFACTURERS SCREW
MACHINE PRODUCTS,

Appellees,

v.

NAXON UTILITIES CORPORATION, a
Corporation,

Appellant.

APPEAL FROM THE MUNICIPAL
COURT OF CHICAGO.

331 I.A. 174

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action against defendant to recover \$2,257.50, claimed to be due them for work and labor performed on certain parts to be used in the construction of war aeroplanes. Defendant denied any indebtedness. There was a trial before the court and a finding and judgment in plaintiff's favor for \$1,549.10. Defendant appeals.

It seems to be agreed that defendant had a contract with the Government to construct certain war material, sublet a part of the work to plaintiffs and on August 11, 1944, gave plaintiffs a written order to construct 73,000 "sleeve blanks" for which defendant was to pay 14¢ each. The material for the parts was furnished by defendant to plaintiffs; plaintiffs commenced making and delivering the parts to defendant and, claiming they had not been paid in full, brought suit to recover \$1,805.16 for 12,894 parts delivered January 17, 1945, and \$2,032.10 for 14,515 parts delivered on February 3, 1945. The amount of the claim was \$3,837.26, on which plaintiffs gave credit for a payment on February 3, of \$1,579.76, leaving \$2,257.50, for which they sued. The foregoing is the substance of the allegations of plaintiffs' statement of claim.

Defendant filed a number of affidavits of defense in all of which it denied that it was indebted to plaintiffs in any sum. In its amended defense it set up the delivery of parts

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by plaintiffs to defendant and rejections of certain of them because they were claimed not to be up to specifications; and further that "plaintiffs delivered parts far in excess of the number ordered and that these parts were not accepted by the defendant." This quoted allegation was omitted from the second amended defense which was the one on which the cause went to trial.

The undisputed evidence shows that plaintiffs made deliveries, from time to time, of parts, and in nearly all of the deliveries defendant rejected some as not being according to specifications and they were returned to plaintiffs for correction, some were corrected and redelivered to defendant. The only parts involved in this suit are the following: on December 1, 1944, plaintiffs delivered 7789 parts of which defendant rejected 5398 which were taken back by plaintiffs for correction; December 12, 8724 parts delivered, 5397 of them rejected and returned to plaintiffs for correction and January 6, 1945, 4280 parts were delivered, of which 3720 were rejected and returned to plaintiffs for correction. The parts rejected, as above mentioned, were returned to plaintiffs for correction on February 2, 6459 parts because of "collet" marks and February 6, 1945, 8056 parts because of being oversize. It was stipulated that afterward these 14515 parts were again delivered by plaintiffs to defendant, all of which were rejected by defendant and plaintiffs were notified to come and take them back, which was not done.

Defendant's contention is that the judgment is against the manifest weight of the evidence - that the overwhelming weight of the evidence shows that the parts involved in this controversy did not meet the specifications of the contract and were therefore properly rejected. On the other side, plaintiffs'

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position is that the finding and judgment is supported by the manifest weight of the evidence and further, that the findings "are final and conclusive upon appeal, where, as in the present case, there is competent evidence in the record to support them." This latter contention is not the law. Read v. Friel, 327 Ill. App. 532.

The question for decision is whether the parts involved meet the specifications of the written contract. Leo Gold, one of the plaintiffs, testified that he was notified of the rejection of the parts by Mr. Mahoney, defendant's superintendent, who told the witness that the parts had "collettmarks on them." That Gold then went to defendant's place, looked over the parts and talked with Mahoney; that the witness then said to Mr. Ruben, employed by defendant, that the parts had no collet marks on them; that Mr. Mahoney said these parts had collet marks on them. The parties then talked of settlement. On cross-examination he testified that plaintiffs had "reworked" 6459 of the 14515 parts and that they had redelivered them to defendant February 2. That he did not examine all of these parts - just looked at the lot which were in barrels, just inspected the ones on the top. That he did not see any collet marks on them. That probably 500 or 600 of the 8056 parts had been reworked by plaintiffs and then all of those parts were redelivered to defendant; that the reason they redelivered those 8056 parts to defendant was that "Mahoney told me to ship them in."

John Mahoney, superintendent of defendant, testified that Mr. Gold came to defendant's place of business on November 2, 1945, with his chief inspector; that "He (Gold) went through the parts, grabbed a few out of each barrel and looked them over, and I said 'I know these parts have^{not} been re-worked orvthey were rejects.'" The witness further testified that he examined the shipment of 6459 parts and found they were oversize on the shoulder and some of them had collet marks; that they made an inspection of about

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10% of the shipment; that he personally examined 50 or 60 parts - "I found the parts were no good. With the gauge I found out that the shoulder was over-sized. Got all of them. I would say out of fifty there was about six that were okay on the shoulder, but they had collet marks on so they were rejected on the other angle." On cross-examination he testified that the parts which were "over-sized could be corrected, but if they had collet marks they could not be corrected. Out of the shipment of February 2nd nearly all of those could have been corrected." The 8056 pieces which defendant had rejected and returned to plaintiffs on January 22, 1945, were redelivered by plaintiffs to defendant February 6, 1945. Mr. Gold testified that "The reason for reworking only 500 or 600 was because Mahoney told me to ship them in." This was denied by Mr. Mahoney. There is considerable other evidence in the record but we think it unnecessary to discuss it further.

Counsel for defendant say "A collet mark is a deep scratch or longitudinal indentation caused by the clamping of tools used during the machining process. If a part had such a collet mark or marks it could not be used, nor was it possible to correct such a part which had already been reduced from oversize to minimum size by buffing the part, because buffing would wear off the metal and make the wall thinner. The part would then not meet the dimensional specification of the U. S. Army as shown on the blueprint." We think this statement is borne out of the evidence. We think all the evidence shows that these parts were not in accordance with the specifications and that plaintiffs are not entitled to recover for these parts.

We are further of opinion that the overwhelming weight of the evidence is to the effect that the 6459 parts were not used because there were collet marks on them and they were

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not useable for aeroplane parts to be used in the war, for which they were being made.

The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Niemeyer, J., and Feinberg, J., concur.

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PIONEER AMUSEMENT CORPORATION,
a Corporation,

Appellant,

v.

NEW RIO THEATRE COMPANY, a
Corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

331 E.A. 175

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of forcible detainer against defendant to recover possession of a moving picture theater located at 2540-4 Milwaukee avenue. There was a trial before the court without a jury and a finding and judgment in defendant's favor. Plaintiff appeals.

The record discloses that plaintiff was the lessee of the theater building under a written lease expiring August 31, 1944. April 15, 1943, plaintiff sub-leased the theater building to the defendant for a term commencing April 1, 1943 and expiring August 31, 1944, at \$500 per month and in addition, 15% of the excess of the gross receipts over and above \$52,000 per year, and on the same date, entered into an extension agreement providing that the property be leased to defendant from September 1, 1944 to March 30, 1953 on certain conditions, at a rental of \$500 per month for the first 6 months and for a period of 3 years thereafter, at \$600 per month, etc. plus 15% of the gross receipts in excess of \$52,000. The extension agreement further provided that defendant should make certain improvements, satisfactory to plaintiff, to cost at least \$2,000. On May 31, 1944, Charles - the stock of plaintiff corporation and became chief executive officer and on June 2, 1944, this fact and that the rent should be paid representative of plaintiff named by him.

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execution of the original lease, the theater had been boarded up for about a year and the equipment was in rather a poor condition. Upon the execution of the lease defendant opened the theater and during the first 3 years expended \$10,127 for repairs, improvement and equipment. At times the rent was not paid promptly but all the rent due was paid up to May 1, 1944. Plaintiff had complained from time to time to defendant about the failure to pay the rent promptly and as to certain improvements which the tenant was required to make.

The original lease provided that: "If default shall at any time be made in the payment of rent, or any part thereof, when due and such default shall continue for a period of five (5) days after notice thereof shall have been given, as provided in paragraph 23 hereof, or if default shall be made in any of the other covenants, promises or agreements herein contained to be kept by the Lessee, and such default shall continue for a period of thirty (30) days after notice thereof shall have been given," that plaintiff might take possession, etc. May 2, 1946, plaintiff served a notice of defaults on defendant in which it was stated: "Notice is hereby given of default in payment of \$600 rent due on the first day of May, 1946 under the lease made and entered into as of the 15th day of April, 1943 ***.

"You are again notified that all payments of rent are to be made promptly as provided in said lease as extended *** and likewise that all other covenants and agreements therein contained are to be strictly complied with by you.

"Unless all defaults under said lease as extended and supplemented *** are cured within the time prescribed therein (as to defaults other than payment of rent, reference is made to our Notices of Defaults dated November 23, 1945, December 4, 1945, January 5, 1946, February 6, 1946, March 2, 1946 and April 2, 1946 respectively, heretofore served upon you), the Lessor or its agent

will re-enter and take full and absolute possession *** by forcible entry and detainer proceedings, or by other process of law."

Leo Solomon, president of the defendant company, testified that about 1:30 P. M. May 7, 1946, accompanied by his wife, he went to Mr. Charles Jacobs' residence which was located at 2832 Cambridge avenue, Chicago, where the rent was required to be paid, to pay the May rent of \$600; that he rang the bell but nobody answered; that the next afternoon he made another trip to the Jacobs' residence, accompanied by his wife, and again rang the bell but no one answered, and about 10 o'clock on the evening of that day, May 8, he made a third visit to Jacobs' residence, accompanied by his wife, rang the bell and that the door was opened by Jacobs' wife; that he tendered the \$600 in cash for the rent and Mrs. Jacobs replied that she could not accept the rent because it was late at night and she was not dressed. That he then told her he had been there that afternoon and on the previous afternoon but that no one was home; that she refused to accept the rent and shut the door. On the next day, May 9, between 5:30 and 6 P.M., the witness made another trip, accompanied by his wife, and rang the bell; that Mr. Jacobs' son, Raymond, opened the door. The witness then tendered him the \$600 but Raymond replied that he could not take the rent because his father and mother were not home. That on the following day, May 10, upon advice of the attorney, he mailed a check for \$600 to Jacobs by registered mail, but the letter was returned marked "refused."

Three days afterward, plaintiff filed the instant case for possession. The evidence further shows that May 31, 1946, defendant mailed two checks by registered mail to plaintiff, one for the May and the other for the June rent; that the letter was returned marked "refused."

Charles Jacobs, plaintiff's president, testified at considerable length as to his dealings with defendant company and on cross-examination testified that he was not at home on May 7, 8 or 9, 1946, for the reason that he had been injured in an accident and was at a hospital in Milwaukee during those days, and was visited there by his family. The record discloses that the court was then recessed for a few minutes and Mr. Jacobs, on further cross-examination, testified that the accident in which he was injured occurred on April 30, and his wife visited him there a couple of days afterward; that he was at the hospital 3 or 4 days and then came home; that he was home on the 7, 8 and 9 of May; that on May 7 "I was home all day, and home all day on the 8th, on the 9th I was not home but my wife and son were home. I just returned to stay for a little rest. I testified before recess I was in the hospital the first few days of the accident. I don't remember testifying I was in the hospital on the 7th, 8 and 9th."

The evidence further shows that shortly after May 31, 1944, when Mr. Jacobs acquired the stock of the plaintiff company he began to serve notices on defendant claiming that it had not lived up to the terms of the written lease. On direct examination he testified that he purchased the stock in the plaintiff company; "I was purchasing this property in 1944 for the purpose of getting this theatre and operating it myself."

There is considerable conflict in the evidence but we think it would serve no useful purpose to discuss it further.

Plaintiff contends that "When there is a continuing cause for forfeiture, the acceptance of payments after a breach, incurring the forfeiture was originally committed, will not preclude an insistence upon the forfeiture if breach continues after acceptance, or new breach occurs." We have had this question before us many

times and have always held that where rent is payable on the first of the month in advance, but in the course of dealing between the landlord and tenant the rent is paid later than the first, before the landlord can require a strict performance he must notify the tenant to that effect, as forfeitures are not favored in the law.

Famous Permanent Wave Shops, Inc. v. Smith, 302 Ill. App. 178.

In the instant case, plaintiff served a five day notice on May 2 and the rent was tendered May 7, which was within the 5 days. The notice of May 2 mentioned other notices of claimed defaults as to other matters than the payment of rent. As stated, the rent was tendered within the 5 days and several times thereafter and the tender was sufficient to prevent any forfeiture of the lease on account of non-payment of the rent. Under the facts disclosed by the evidence, nothing further in this respect was required of the defendant. The law never requires the doing of a useless act.

Further complaint is made that defendant was in default in making the improvements which the lease required; that they were not approved by plaintiff, but we think there is no merit in this because they were submitted to plaintiff's representative and the evidence shows they were made pursuant to plans drafted by plaintiff's own architect and under his supervision at a cost exceeding the amount required by the lease.

A further contention is made by plaintiff that the lease was breached for the reason that defendant failed to submit sworn statements of gross income derived from the theater. The evidence shows that statements were furnished showing receipts of \$40,741.16 for the year ending March 31, 1944, and a statement showing the gross receipts of \$19,579.45 for the period commencing April 1, 1944 and ending August 31, 1944. And a statement commencing April 1, 1944 and ending August 31, 1945, which showed gross receipts of

times and have always held that where rent is payable in the first of the month in advance, but in the course of dealing between the landlord and tenant the rent is paid later than the first, before the landlord can require a strict performance he must notify the tenant to that effect, as forfeitures are not favored in the law.

Tenants' Remedy, 100 Ill. App. 178.

In the instant case, plaintiff served a five day notice on May 2 and the rent was tendered May 5, which was within the 5 days. The notice of May 2 mentioned other notices of claimed defaults as to other matters than the payment of rent. As stated, the rent was tendered within the 5 days and general lease forfeiture and the tender was sufficient to prevent any forfeiture of the lease on account of non-payment of the rent. Under the facts disclosed by the evidence, nothing further in this respect was required of the defendant. The law never requires the doing of a useless act.

Further complaint is made that defendant was in default in making the improvements which the lease required; that they were not approved by plaintiff, but no claim there is no merit in this because they were submitted to plaintiff's representative and the evidence shows they were made pursuant to plans devised by plaintiff's own architect and under his supervision at a cost exceeding the amount required by the lease.

A further contention is made by plaintiff that the lease was breached for the reason that defendant failed to submit annual statements of gross income derived from the theater. The evidence shows that statements were furnished showing receipts of \$4,741.18 for the year ending March 31, 1944, and a statement showing the gross receipts of \$19,679.45 for the period commencing April 1, 1944 and ending August 31, 1944. And a statement commencing April 1, 1944 and ending August 31, 1945, which showed gross receipts of

\$35,590.50. These receipts were all less than the \$52,000 gross receipts mentioned in the lease and the evidence fails to show any claim made in this respect, prior to the time of the trial.

Plaintiff further contends that "The finding is clearly against the manifest weight of the evidence." We think this contention cannot be sustained. Although there was sharp conflict in some of the testimony, the trial court in deciding the case said: "The Court could not put a great deal of credence in the testimony of the plaintiff, [Mr. Jacobs] except where he is corroborated by other competent testimony. The Court is satisfied that good legal tender was made in this case for the rent. It is true that notices were filed from time to time by the plaintiff, and if the plaintiff acted in good faith in serving those notices, why didn't he bring an action on those individual notices? *** In my opinion, this action is not brought in good faith. The testimony of the defendant, the great amount of money that he spent, not only in repairs, but in building, rehabilitating this theater, impresses the Court that the man was trying to make a success of the place and live up to the terms of his lease in every shape, manner and form.

"It is quite significant to the Court that the plaintiff at one time said that his sole purpose of getting possession of it was to operate this theater for his own selfish interests."

A number of other contentions are made by plaintiff which we have considered but we think it would serve no useful purpose to discuss them for we are of opinion that the judgment of the trial court was right and it is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Feinberg, J., concur.

These receipts were all less than the \$5,000 gross receipts mentioned in the law and the evidence also to show any claim made in this receipt, prior to the time of the trial. Plaintiff further contends that "the finding is clearly against the receipt receipt of the witness." In this case contention cannot be sustained. Although there are many cases in some of the testimony, the trial court in deciding the case said: "The Court could not put a great deal of credence in the testimony of the plaintiff, [Mr. Jacobs] except where he is corroborated by other competent testimony. The Court is satisfied that good legal tender was made in this case for one dollar. It is true that notices were filed from time to time by the plaintiff, and it is plaintiff's duty to keep in good faith in serving these notices, but that he bring an action on these individual notices was in my opinion, this action is not brought in good faith. The testimony of the defendant, the great amount of money that he spent, not only in repairs, but in building, rehabilitating this theater, improving the Court that the man was trying to make a success of the place and live up to the terms of his lease in every way, manner and form. "It is quite significant to the Court that the plaintiff at one time said that his sole purpose of getting possession of it was to operate this theater for his own selfish interests." A number of other contentions are made by the plaintiff which we have considered but we think it would serve no useful purpose to discuss them for we are of opinion that the judgment of the trial court was right and it is affirmed.

JUDGMENT AFFIRMED.

Wiemeyer, J., and Weinberg, J., concur.

43971

THENIA McSWAIN,

Appellant,

v.

ABE NASH,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

331 I.A. 175² 164

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse an order entered by the Superior court of Cook county vacating a judgment for \$2,000.00 entered against him in plaintiff's favor^{and}/permitting him to plead.

The record discloses that plaintiff filed a suit to recover damages against defendant for a breach of promise to marry. Defendant was served with summons, failed to enter his appearance, he was defaulted and, September 24, 1945, a judgment for \$2,000.00 was entered against him. Afterward an execution was issued, returned no part satisfied. Garnishment proceedings were brought, the First National Bank of Champaign, Illinois, was served as garnishee. Shortly afterward, defendant was notified by the Bank and on November 17, 1945, filed his motion under section 72, of the Civil Practice Act, to vacate the judgment and to permit him to defend. The motion was supported by defendant's affidavit in which he swears that he is 43 years of age, married and supporting a wife and daughter age 16. That he was employed as a laborer for the Illinois Central Railroad Company at Paxton, Illinois, and lived in Champaign, Illinois; that some time in the summer of 1943, he visited his friends, Mr. Henderson and wife, in Chicago, and there met plaintiff, who lived in the same building with his friends; that afterward, on August 4, 1945, he came to Chicago to again visit the Hendersons and while he was at their home he was served by a deputy sheriff "with a paper. * * * that he can neither

THE STATE OF ILLINOIS

Appellant,

v.

THE PEOPLE OF THE STATE OF ILLINOIS

Appellee.

IN SENATE

SUBJECT: REVERSAL OF JUDGMENT

IN SENATE

MR. PRESIDING JUDGE OF COURT DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse an order entered by the Superior Court of Cook County granting a judgment for \$2,000.00 entered against him in plaintiff's favor, and him to clear.

The record discloses that plaintiff failed to appear to recover damages against defendant for a breach of promise to marry. Defendant was served with summons, failed to enter his appearance, he was defaulted and, September 24, 1945, a judgment for \$2,000.00 was entered against him. Afterward an execution was issued, returned no part satisfied. Garnishment proceedings were brought, the First National Bank of Chicago, Illinois, was served as garnishee. Shortly afterward, defendant was notified by the bank and on November 17, 1945, filed his motion under section 73 of the Civil Practice Act, to vacate the judgment and to permit him to defend. The motion was supported by defendant's affidavit in which he swears that he is 43 years of age, married and supporting a wife and daughter age 12. That he was employed as a laborer for the Illinois Central Railroad Company at Joliet, Illinois, and lived in Chicago, Illinois; that some time in the summer of 1945, he visited his friends, Mr. Henderson and wife, in Chicago, and there met plaintiff, who lived in the same building with his friends; that afterward, on August 4, 1945, he came to Chicago to again visit the Hendersons and while he was at their home he was served by a deputy sheriff with a paper. * * * that he can neither

read nor write;" that afterward, on August 10, 1945, plaintiff came to his residence in Champaign, Illinois, and told him to disregard the paper served on him in Chicago; that it was no good and for him to forget about it; that it was all a mistake and that he did not have to bother with it; that, relying upon plaintiff's statements, he did nothing about the "paper" and that he heard nothing about the suit until November 9, 1945, when he was informed by the First National Bank of Champaign, that the bank had been served as garnishee; that plaintiff "is a woman about 60 years of age and appears to be paralyzed in two of her limbs. * * * that he never at any time promised Thenia McSwain that he would marry her and that he never at any time asked her to marry him."

After defendant's motion was filed, a number of other motions were made and orders entered but we think it unnecessary to refer to them here except to say that plaintiff moved to strike defendant's motion and affidavit in support of it, which was overruled, and afterward the court entered the order appealed from, from which it appears that the defendant's verified motion to vacate and set aside the judgment and the motion of plaintiff to strike defendant's motion, came on to be heard; that the court had theretofore overruled plaintiff's motion to strike "but at this hearing on motion of plaintiff's counsel having allowed same to stand as her answer to defendant's motion, and now again both parties hereto appearing before the court, on motion of the attorney for the defendant, and after hearing the evidence and the arguments of counsel" it was ordered and adjudged that defendant's motion to vacate be allowed; the default was set aside, the judgment vacated and defendant given 15 days in which to plead to the complaint.

Plaintiff's theory of the case, as stated by her counsel is that (1) where a judgment is entered, the court has no jurisdiction to vacate or set aside the judgment after 30 days and (2) that the order vacating the judgment was not warranted under

read nor write;" that afterward, on August 15, 1945, Plaintiff came to his residence in Champaign, Illinois, and told him to disregard the paper served on him in Chicago; that it was no good and for him to forget about it; that it was all a mistake and that he did not have to concern with it; that, relying upon Plaintiff's statements, he did nothing about the "paper" and that he heard nothing about the suit until November 2, 1945, when he was informed by the First National Bank of Champaign, that the bank had been served as defendant; that Plaintiff is a woman about 30 years of age and appears to be married in two of her limbs. * * * that he never at any time provided Thomas Kervain that he would marry her and that he never at any time asked her to marry him.

After defendant's motion was filed, a number of other motions were made and orders entered but no ruling at unnecessary to refer to them here except to say that Plaintiff moved to strike defendant's motion and affidavit in support of it, which was overruled, and afterward the court entered the order requested from which it appears that the defendant's revised motion to vacate and set aside the judgment and the motion of Plaintiff to strike defendant's motion, came on to be heard; that the court has therefore overruled Plaintiff's motion to strike "but as this hearing on motion of Plaintiff's counsel having already been held stand as her answer to defendant's motion, and now again both parties hereto appearing before the court, on motion of the attorney for the defendant, and after hearing the evidence and the arguments of counsel" it was ordered and adjudged that defendant's motion to vacate be allowed; the default was set aside, the judgment vacated and defendant given 15 days in which to plead to the complaint.

Plaintiff's theory of the case, as stated by her counsel is that (1) where a judgment is entered, the court has no jurisdiction to vacate or set aside the judgment after 30 days and (2)

Section 72 of the Civil Practice Act.

Defendant's theory is that the order vacating the judgment was authorized by the provisions of Section 72 of the Civil Practice Act. Counsel, in support of plaintiff's second contention say that defendant's motion to vacate and set aside the judgment "must show in his affidavit: (a) that he has not been negligent, and has used due diligence, (b) that he has a meritorious defense." We think this is a correct statement of the law. But defendant in his affidavit in support of his motion to vacate the judgment and for leave to defend, swears that he could neither read nor write and that after he was served by the sheriff in Chicago and had returned to his home in Champaign, plaintiff saw him and told him that the suit she brought in Chicago was a mistake and for him to pay no further attention to it, and the affidavit further sets up that he never promised to marry her; and her motion to strike this affidavit which on plaintiff's motion was allowed to stand as her answer to defendant's motion does not deny either of these allegations and what evidence was before the court is not in the record. In these circumstances, we think it obvious that what the court did in vacating the judgment and giving defendant leave to plead, was the only order that could be entered under the law. In Jacobson v. Ashkinaze, 337 Ill. 141, the court, in discussing what must appear before a judgment could be vacated under Section 72, said that if there was "fraud, duress or excusable mistake and without negligence on the part of the defendant" and he had a valid defense of which the court was not advised, the motion would lie.

In the instant case we must assume that the facts alleged in defendant's affidavit in support of the motion were true. On this assumption, plaintiff was guilty of fraud in telling defendant

Section 75 of the Civil Practice Act.

Defendant's theory is that the order vacating the judgment

was authorized by the provisions of Section 75 of the Civil

Practice Act. Counsel, in support of plaintiff's second contention

says that defendant's motion to vacate and set aside the judgment

"must show in his affidavit: (a) that he has not been negligent,

and has used due diligence, (b) that he has a verifiable reason."

We think this is a correct statement of the law. The defendant

in his affidavit in support of his motion to vacate the judgment

and for leave to defend, states that he could neither read nor

write and that after he was served by the sheriff in Chicago and

had returned to his home in Newburgh, New York, and his wife

told him that the suit she brought in Chicago was a mistake and for

him to pay no further attention to it, and the plaintiff further

sets out that he never procured to marry her; and her motion to

strike this affidavit which on plaintiff's motion was allowed to

stand as her answer to defendant's motion does not deny either of

these allegations and that evidence was before the court is not

in the record. In these circumstances, we think it obvious that

what the court did in vacating the judgment and giving defendant

leave to plead, was the only order that could be entered under

the law. In Jacobson v. Ashkinase, 237 Ill. 141, the court, in

discussing what must appear before a judgment could be vacated

under Section 75, said that if there was "fraud, duress or

excusable mistake and without negligence on the part of the

defendant" and he had a valid defense of which the court was not

advised, the motion would lie.

In the instant case we must assume that the facts alleged

in defendant's affidavit in support of the motion were true. On

this assumption, plaintiff was guilty of fraud in telling defendant

to pay no attention to the suit; that it was a mistake, and if it was also true that he had never promised to marry her, as the affidavit showed, then under the law, the order was warranted. Moreover, since the order appealed from recites that the court heard the evidence, which is not in the record, we must assume that the evidence sustained the averments of defendant's affidavit.

The order of the Superior court of Cook county appealed from is affirmed.

AFFIRMED.

Niemeyer, J., and Feinberg, J., Concur.

43982

CALUMET FEDERAL SAVINGS AND
LOAN ASSOCIATION OF CHICAGO,
a United States corporation,

Appellee,

v.

ALEXANDER NAGUSZEWSKI,

Appellant.

3311A.176

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in forcible detainer against defendant to recover possession of a frame building known as 9510 Torrence avenue, Chicago. Defendant was served with process but failed to file an appearance. He was defaulted and judgment for possession entered. Afterward, by leave of court, defendant filed his verified petition and prayed that the judgment be vacated and set aside. The court refused to vacate the judgment but stayed the writ of restitution for 60 days; defendant appeals.

July 1, 1946, plaintiff filed an action in forcible detainer to recover possession of the frame building which, it was alleged, consisted of a store on the first floor used as a tavern, basement used as storage room "and 6 rooms on the 2nd floor." That plaintiff leased the building to defendant for a period beginning July 1, 1943, and ending June 30, 1944, to be used as a tavern. There was no renewal of the lease; that on April 25, 1946, plaintiff served a 60 day notice on defendant terminating defendant's right of occupancy and on July 1, 1945, demanded possession. Alias summons was served on defendant on July 17, 1946. July 23, the cause came on for hearing before the court without a jury and defendant not appearing, was defaulted. That thereupon the cause came on for trial and the court, after hearing the evidence, entered judgment in plaintiff's favor for possession. It was ordered that the writ of restitution be stayed for a period of 5 days.

August 29, defendant, by leave of court, filed his verified petition in which he averred that he had been a tenant of the premises for a period of 9 years, at a monthly rental of \$40; that all the rent had been paid except for the months of July and August, 1946, which he offered to pay to plaintiff but the offer was refused. That he was still ready, able and willing to pay the rent. That for a number of years Torrence avenue had been closed which depreciated the property and injured defendant's business; that plaintiff had brought suit against the City of Chicago and promised to reimburse defendant for losses he sustained when plaintiff won its suit. Plaintiff had a judgment in the trial court in that suit but the matter was reversed and the cause remanded by the Appellate court and the case was then still pending. That in the early part of 1946, plaintiff filed a forcible detainer suit against defendant "and that there was a finding in favor of the defendant." That defendant had endeavored to obtain a lease or to purchase the property from plaintiff and the matter was held in abeyance, plaintiff having given no definite answer.

Defendant further avers that when he received the summons he talked to plaintiff's secretary about purchasing the building, who told defendant he thought plaintiff would sell the building to defendant; that about July 22, before the date of the return of the summons, defendant had a conversation with the attorney for plaintiff about the purchase of the building for \$10,000; that the attorney then advised defendant it was not necessary for him to go to court; that the attorney would take care of the matter of the suit and the sale of the building. That August 22, 1946, defendant had another conversation with plaintiff's secretary, who advised defendant that the sale would go through and defendant would be allowed to purchase the building; that defendant, relying on these statements, was

Q. Now, you're going to tell me that the defendant was not in the car at the time of the shooting, is that correct?

Received 10 June 2003; accepted 10 July 2003

7. The following is a list of the names of the persons who are to be named in the report:

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— *Journal of the American Medical Association*, 1997; 278: 1033-1037

doi:10.1017/S0007122612000061 Published online by Cambridge University Press

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

THE UNIVERSITY OF CHICAGO PRESS, 108 EAST 57TH STREET, NEW YORK, N.Y. 10022

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not aware that a judgment had been entered against him until about August 15, 1946; that defendant had a good and meritorious defense "and that the 2nd floor being occupied as living quarters and plaintiff failed to comply with the Office of Price Administration and that the said suit was improperly instituted and should be dismissed" and prayed that the judgment be vacated and set aside.

As stated above, the court, on October 17, entered an order overruling defendant's motion to vacate the judgment of July 23, and ordered the writ of restitution stayed for an additional 60 days.

The record discloses that on October 24, 1946, a certain "Statement of Facts and Stenographic Report" was filed in the office of the clerk of the Municipal court. That statement purports to set forth what took place before Judge Zuris on October 17, at 2 o'clock, p.m., as follows: Mr. Green [counsel for defendant] "Here is my position, Judge. We can agree on these facts: That for many years, he has been in this building and rented it for \$40 a month. It consists of a tavern on the first floor and living quarters of 6 rooms on the 2nd floor. He has been subletting that, with the knowledge of the plaintiff, for many years. He occupies one of the rooms as a dwelling house. The rest is occupied by a family by the name of Peter Pierkerski, who lives there with his wife and 5 children. *** We have no lease, just month to month. And where there is a commercial piece of property joined with the house, in order to separate them, they must get a certificate from the Office of Price Administration; and counsel will agree that they have not a certificate of allocation from the O.P.A. That is our contention, Judge.

"Judge: It is further understood that the defendant lived with his family at another address." Immediately following is

the certificate by the court reporter that the foregoing is a true and correct stenographic report. Then there appears "Approved statement of facts this 24th day of October, A. D. 1946 ENTER _____, Judge." And below "Submitted October 24, 1946, J. T. Zuris, Judge." This so-called report of proceedings, so far as we can ascertain, was never approved by the judge.

Section 21, of the Municipal Court Act, (par. 376, ch. 37, Ill. Rev. Stat. 1945,) provides that when 30 days have elapsed after the entry of a judgment it may be vacated and set aside for any errors of fact not appearing of record "in the manner provided by law for similar cases in the circuit courts." And Section 72, (par. 196, of the Civil Practice Act, ch. 110, Ill. Rev. Stat. 1945,) abolishes the writ of error coram nobis and provides that "all errors in fact, committed in the proceedings of any court of record, and which by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case," etc. In Jacobson v. Ashkinaze, 337 Ill. 141, it was held that the statutory motion provided by sec. 72, of the Civil Practice Act, authorizes the correction of a judgment for "matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are *** the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case."

There is no report of the proceedings in the record, simply a statement by counsel for defendant and the document in the record was not approved by the trial judge, therefore it

cannot be considered.

We think the petition filed by defendant set up sufficient facts to have the judgment vacated so that defendant could interpose a defense to the merits. From the petition it appears that plaintiff expected to purchase the property and that he was told by a representative and by the attorney for plaintiff, that the deal would go through and that he did not need to appear in court. And further, that the defendant had endeavored to obtain a lease in case he did not purchase the property and that the matter was held in abeyance; that the second floor of the building was occupied as living quarters and that plaintiff had failed to comply with the requirements of the Office of Price Administration. From what we have said we think it clear that the court would not have entered the judgment had he been advised of the facts and that defendant was without negligence in failing to interpose his defense.

The court erred in refusing to sustain defendant's motion to vacate the judgment and the order is reversed and the matter remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

Niemeyer, J., and Feinberg, J., concur.

44006

THE PEOPLE OF THE STATE OF ILLINOIS,
ON THE RELATION OF MARVIN W. HART,

Appellee,

v.

THE CITY OF CHICAGO, a Municipal
Corporation, EDWARD J. KELLY, Mayor
of Chicago, MATTHIAS BAULER, City
Collector, JOHN C. PRENDERGAST,
Commissioner of Police, LUDWIG D.
SCHREIBER, City Clerk,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

331 I.A. 177

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 7, 1946, plaintiff filed a petition for a writ of mandamus to compel defendants to restore a license issued by the City to Marvin W. Hart, by which he was authorized to conduct a "massage parlor". The license was revoked by the City officials July 29, 1946, and by its terms it expired December 31, 1946. Defendants filed their answer, the cause was heard by the court without a jury and the writ of mandamus awarded. Defendants appeal.

In People v. City of Streator, 258 Ill. 273, the court said: "The rule has long been recognized in this court that the writ of mandamus will not be issued in any case where it will prove unavailing, fruitless or nugatory; that the court will not compel the doing of a vain and useless thing."

The license, if issued as amended, would have expired December 31, 1946; it would therefore be useless to issue it at this time. As stated in the Streator case: "The writ cannot be made effective to compel the city to grant a license for a period which has expired. The argument of appellee that the granting of the writ would be beneficial to him to fix his status as to a license in the future is without force." And such reasons are then pointed out by the court.

THE PEOPLE OF THE STATE OF ILLINOIS,
ON THE PETITION OF MARVIN W. HART,

Appellee,

v.

THE CITY OF CHICAGO, a Municipal
Corporation, EDWARD J. KELLY, Mayor
of Chicago, MARTIN S. BARRY, City
Collector, JOHN C. BRENNAN, City
Commissioner of Police, LUDWIG A.
SCHREIBER, City Clerk,

Appellants.

1. PRESIDENT JAMES O. MONROE DELIVERED THE MESSAGE TO THE SENATE.

August 7, 1946, defendant filed a petition for a writ of

mandamus to compel defendant to remove a license issued by the

City to Marvin W. Hart, by which he was authorized to conduct a

"massage parlor". The license was revoked by the City on

July 28, 1946, and by the same it expired December 31, 1946.

Defendants filed their answer, the same was heard by the court

without a jury and the writ of mandamus was granted. Defendants

in People v. City of Chicago, 336 Ill. 415, 1931, 203

said: "The rule has long been recognized in this court that the

writ of mandamus will not be issued in any case where it is

unavailing, fruitless or nugatory; that the writ will not compel

the doing of a vain and useless thing."

The license, if issued as amended, would have expired

December 31, 1946; it would therefore be useless to issue it at

this time. As stated in the People case: "The writ cannot be

made effective to compel the city to grant a license for a period

which has expired. The argument of appellee that the granting

of the writ would be beneficial to him to fix his status as to

a license in the future is without force." And such reasons are

then pointed out by the court.

We have this day filed an opinion in People ex rel. Swanson v. City of Chicago, #43995, where the same question was involved and we dismissed the appeal.

For the reasons stated, the appeal is dismissed.

APPEAL DISMISSED.

Niemeyer, J., and Feinberg, J., Concur.

44029

RALPH HINNERS,
Appellee,
v.
GEORGE R. HUNT,
Appellant.

1674
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO,

331 I.A. 177

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover possession of store premises situated at 1767 W. Greenleaf avenue, Chicago. The defendant entered his appearance as "Fred R. Hunt, sued herein as George R. Hunt." The jury returned a verdict finding defendant not guilty but the court entered judgment in plaintiff's favor notwithstanding the verdict. Defendant appeals.

Defendant was occupying the premises in publishing his weekly newspaper called "The Chicago Leader," and apparently had been a tenant of George R. Hinnners, plaintiff's father, from 1916 until the father passed away in 1939. Afterward, on October 1, 1945, plaintiff, Ralph Hinnners, as lessor, leased the premises to defendant, Fred R. Hunt, for a period beginning November 1, 1945 and expiring October 31, 1948. The lease provided that defendant should pay as rent \$1800 in monthly installments of \$50 each, the payments to be made on the first day of each and every month and "that the time of each and all of such payments is of the essence of this agreement." From time to time after the execution of the lease defendant made partial payments of the rent to plaintiff and being in default in the payment of the rent, plaintiff brought an action of forcible detainer against defendant on July 11, 1946. There was a trial before the court without a jury and August 21, 1946,

2.

a finding and judgment in defendant's favor. Afterwards, August 23, 1946, plaintiff wrote defendant a letter calling attention to the terms of the lease which provided for monthly rental of \$50, to be paid on the first of each and every month, and following this, the letter stated: "You are hereby notified that notwithstanding the fact that the undersigned as lessor *** may have in the past accepted monthly installments of rent after the same became due upon the first of the month, that on and after September 1, 1946 no payments will be accepted under said lease unless the same are paid in cash or equivalent on the 1st of each and every month *** in advance, *** as provided in said lease." On the next day, August 24, plaintiff served a five day notice on defendant notifying him that there was \$150 due for rent, demanding payment "and that unless payment thereof is made on or before the expiration of five days after date of service of this notice your lease of said premises will be terminated." August 29, 1946, defendant wrote plaintiff a letter and on the same day another letter to plaintiff's counsel ^{and} acknowledging receipt of the letter and notice/stating in substance, that defendant had occupied these premises for many years as a tenant of plaintiff's father and after his death, continued to occupy them before the lease, above mentioned, was executed and that during that time he had paid rent when he was able to do so and had also run an advertisement in his paper for plaintiff's father who was in the coal business.

To the complaint in the instant case, defendant filed his answer denying that he was wrongfully withholding possession of the premises and setting up how he had rented the premises from plaintiff's father and the times at which he made partial payments on account of the rent, and that he was to have a deduction of rent for part of the time of \$5 per week for the

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3.

printing of plaintiff's father's advertisement and afterward this allowance was to be \$20 per month, etc. This defense, excepting the denial that defendant was not wrongfully withholding possession, was, on plaintiff's motion, stricken.

Defendant contends that the judgment entered in his favor in the forcible detainer action brought in July, 1946, is res judicata. We think this contention cannot be sustained. We do not know what the evidence was in that case and, moreover, we think it apparent that since it appears plaintiff had been making partial payments on account of his rent at other times than the first of the month, as the lease provided, under the law plaintiff could not insist on the strict letter of the lease without first giving defendant notice to that effect. Burch v. Hickman, #43788, opinion filed January 6, 1947; Vin-Talore v. Pappas, 228 Ill. App. 182, affirmed, 310 Ill. 115; Famous Permanent Wave Shops, Inc., v. Smith, 302 Ill. App. 178; Graft v. Calmeyer, 274 Ill. App. 296; Fisher v. Mich. Sq. Bldg. 328 Ill. App. 143. This has long been the settled law in this state.

In the instant case plaintiff, on August 23, wrote defendant a letter and the next day served him with the five day notice that he must pay the rent promptly on the first of the month. In these circumstances, obviously the judgment was not res judicata.

We are further of opinion that the court did not err in striking that part of defendant's affidavit of defense which purported to set up the method of the dealing between plaintiff's father and after his death, with plaintiff, as heretofore mentioned. This would violate the parol evidence rule, vary the express terms of the lease which provided that the rent must

4.

be paid monthly in advance. Weinstein v. Sprintz, 234 Ill. App. 492; Handley v. Drum, 237 Ill. App. 587; Tegtmeyer v. Nordlund, 259 Ill. App. 247.

Defendant further contends that the premises mentioned in the lease did not belong to plaintiff but to the heirs of plaintiff's father, George R. Hinnars, after the latter's death in 1939 and therefore plaintiff could not maintain this suit. Defendant offered evidence, which on objection, was excluded, showing that from the records of the Probate court of Cook county, George R. Hinnars left him surviving as his only heirs at law, his widow and four children, including plaintiff, but whether George R. Hinnars died testate does not appear. Moreover, the written lease specifically mentions Ralph Hinnars as lessor and defendant as lessee. It was signed by "Ralph Hinnars, Agt." Under the law, defendant, being in possession of the premises under the written lease, cannot question plaintiff's right to make the lease. Levi v. Beadles, 160 Ill. App. 137.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Feinberg, J., concur.

43718

HENRY J. McMANAMAN,
Appellee,

v.

JOHNS-MANVILLE PRODUCTS CORPORATION,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

331 I.A. 178

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant for personal injuries. A trial with a jury resulted in a verdict and judgment for \$25,000 against defendant. The jury also returned a special finding that plaintiff was not guilty of negligence which proximately contributed to cause the injury. Defendant appeals.

The complaint charged that plaintiff at the time of the accident was employed by the Elgin, Joliet & Eastern Railway Company as a freight conductor, engaged in moving, distributing and classifying certain freight cars and in making and breaking up trains that were moving in interstate commerce; that both he and said railway company were then engaged in interstate commerce; that he was in the exercise of due care and was injured in the performance of his duties, which were in furtherance of interstate commerce, and which directly, closely and substantially affected such commerce; that defendant was guilty of negligence in the operation of a certain truck, and as a direct result thereof plaintiff was injured.

Defendant, in addition to denying negligence, specially pleaded the defense that all of the parties, the employer of plaintiff as well as plaintiff, and defendant and its employees, were subject to the Workmen's Compensation Act (§29, ch. 48, par. 166, Ill. Rev. Stat.); that the accident arose out of and in the course of plaintiff's employment, and that his only remedy was

HENRY J. MONAHAN, Appellee,

JOHN - MARVIN L. MONAHAN, Appellant,

JOHN - MARVIN L. MONAHAN, Appellant,

MR. JUSTICE WILLIAM BRIDGES, JR.

Plaintiff's brief on motion against defendant for

personal injuries. A trial was held in 1935, and judgment for \$5,000 against defendant. The jury also returned a special finding that plaintiff was not guilty of negligence which proximately contributed to cause the injury.

Defendant appeals.

The complaint charged that plaintiff at the time of the

accident was employed by the Illinois, Mobile & Western Railway Company as a freight conductor, engaged in moving, that it was and classifying cars, freight cars and in making and breaking

up trains that were moving in interstate commerce; that

he and said railway company were then engaged in interstate

commerce; that he was in the exercise of his duties and was injured

in the performance of his duties, which were in furtherance of

interstate commerce, and which directly, indirectly and substantially affected such commerce; that defendant was guilty of negligence in

the operation of a certain truck, and as a direct result thereof

plaintiff was injured.

Defendant, in addition to denying negligence, specially

pleaded the defense that all of the parties, the employer

of plaintiff as well as plaintiff, and defendant and its employees,

were subject to the Workmen's Compensation Act (220, Ch. 45, Ill.

186, Ill. Rev. Stat.); that the accident arose out of and in the

course of plaintiff's employment, and that the only remedy was

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under said section 29. It also denied plaintiff was, at the time or immediately prior thereto, engaged in interstate commerce.

At the close of all the evidence, plaintiff filed a motion to strike this special defense because the undisputed evidence showed that, as a matter of law, plaintiff and the railway company were engaged in interstate commerce at the time of the accident. The motion was allowed, and that portion of the answer was stricken. This ruling is assigned as error.

It appears from the evidence that defendant maintained a building on its premises known as the "roofing building" extending east and west about 800 feet, with a width of about 300 feet. The railroad's switch track No. 7, upon which this accident occurred, extends along the north side of the building. This track maintained on defendant's property, runs straight, due west, from a point about 300 feet east of the building to the west end of the building. The building in question had a doorway, where this accident occurred, which was level with the ground and approximately 10 or 12 feet wide. The floor of the building proper was higher than the ground level, which produced a 4 foot descent to the ground level by means of a ramp 25 or 30 feet long. The ramp extended across the tracks of the railway company, with allowable space for the rails. Down this ramp and across the tracks, defendant's employees trucked loads of asphalt products to a storage place north of track No. 7. Inside the doorway involved in this accident, and plainly visible to employees going down the ramp, was a sign with a flasher light, carrying the warning "Look Out For the Cars".

Plaintiff was riding the stirrup on the southwest end of the first freight car of the train consisting of 5 empty cars on track 7, backing in with an engine from the east and moving in a westerly direction. Plaintiff was facing to the west, with his back to the south, where the building of defendant adjoined

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the track. A part of plaintiff's assignment at the time of the accident involved the movement of freight cars on the track in question and included the moving of loaded freight cars about 250 feet west of the door of the building, destined for interstate shipment, and spotting these empty cars on the track for loading. These empty cars, it clearly appears from the evidence, were to be loaded for interstate shipment, and waybills were later issued, showing their destination out of the state as interstate shipments.

The undisputed evidence shows that the railway company and plaintiff were both engaged in interstate commerce, and that plaintiff at the time of the accident was performing duties in furtherance of and directly, closely and substantially affecting interstate commerce. Therefore, the Workmen's Compensation Act of Illinois would not control plaintiff's remedy, and the court did not err in striking that portion of the answer relying upon the Workmen's Compensation Act as a defense. Moreover, no evidence offered by defendant supported this special defense. Goldsmith v. Payne, 300 Ill. 119; Mueller v. Elm Park Hotel Co., 391 Ill. 391.

Where the facts are not in dispute, it becomes a question of law for the court whether the plaintiff was engaged in interstate commerce at the time of the accident. Day v. C. N. W. Ry. Co., 354 Ill 469; Philadelphia & R. Ry. Co. v. Hancock, 253 U. S. 284.

One of defendant's employees operated, within the building, a pick-up truck, loaded with merchandise, and was coming down the ramp towards the doorway referred to. In operating the truck his back was to the north of the opening or doorway of this building, which led to track No. 7. It is clear from the evidence

The first. A part of plaintiff's case is that A. H. ... decided it involved the movement of freight cars on the ... in question and included the moving of loaded freight cars ... 800 feet west of the door of the building; ... state alignment, and spotting these empty cars on the ... loading. These empty cars, it is fully apparent from the ... were to be loaded for interstate shipment, and ... later issued, showing their destination was ... interstate shipment.

The undisputed evidence shows that the defendant and plaintiff were both involved in the same business transaction at the time of the defendant's death. In furtherance of and liberally, the defendant's estate and the plaintiff's estate commenced proceedings in the court of Illinois to determine the rights of the parties. The court did not act in violation of the public policy of the State of Illinois upon the defendant's estate. The defendant's estate offered evidence offered by the plaintiff's estate. Goldsmith v. Payne, 370 Ill. 111; Goldsmith v. Payne, 370 Ill. 111.

U. S. 584.
BY. 50., 584 III 488; Philadelphia & N. Y. Co., v. Wood, 7, 584
interstate commenced the time of the accident. May 7, 1907.
of law for the court whether the plaintiff was engaged in
"There the facts are not in dispute, it becomes a question of

One of defendant's employees operated, within the building a pick-up truck, loaded with merchandise, and was coming down the ramp towards the doorway referred to. In reaching the doorway his back was to the north of the opening or doorway of this building, which led to track No. 7. It is clear from the evidence

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that he backed out on to track No. 7 without stopping and without looking and collided with the oncoming freight car, upon which plaintiff was riding, and threw plaintiff to the ground. No satisfactory explanation is made by the operator of the truck for his failure to see the freight cars approaching when there was nothing to obstruct his view. Had he heeded the flasher light signal inside the building at the door opening, which was there for the purpose of reminding him of the danger immediately outside of the doorway, and stopped as he reached the doorway, there would have been no such accident. The freight cars at the time had been slowed down almost to a stop when they reached the doorway in question. Plaintiff was not shown by the evidence to have acted in any way to create any extra risks in the performance of his duties but was performing them in the usual and customary manner in working along track No. 7 as on previous occasions. The jury had a right to say that defendant's employee, in running his pick-up truck down the ramp, through the doorway and against the freight car, was guilty of negligence, which proximately caused the injury to plaintiff. They and the trial judge saw and heard the witnesses and were in a better position to judge their credibility than we can on this appeal. We must not interfere with the province of the jury in the determination of the facts, unless we are prepared to say that the verdict is against the manifest weight of the evidence.

Defendant contends that plaintiff, under the facts, was guilty of contributory negligence, as a matter of law. The special finding of the jury was to the contrary. We believe, under all the evidence, it was clearly a question of fact for the jury. The verdict, we are satisfied, is not against the manifest weight of the evidence. Molloy v. Chicago Rapid Transit Co., 335 Ill. 164; Kelly v. Chicago City Ry. Co., 283 Ill. 640; Gillis v. N. Y. C. & St. L. R. R. Co., 342 Ill. 455; Toombs v. Lewis, 362 Ill. 181.

Defendant complains that it was not permitted, in the

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that he backed out on to track No. 7 without stopping and without
looking and collided with the oncoming freight car, which
plaintiff was riding, and threw plaintiff to the ground.
Satisfactory explanation is made by the evidence for his failure to see the freight car approaching and for
and nothing to obstruct his view. It is also shown that there
signal inside the building at the time of the collision, and that
for the purpose of a signal light at the time of the collision out-
side of the building, and stopped at the signal light.
There would have been no signal light at the time of the collision
time had been closed down almost at the same time as the
the doorway in question. Plaintiff's testimony is that he
chance to have noted in any way the freight car which is
performance of his duties but was not negligent in the
and customary way in working along track No. 7 as on
previous occasions. The jury had a right to say that defendant's
employee, in running his electric freight car as a yard, through
the doorway and against the freight car, was negligent of his duties,
which proximately caused the injury to plaintiff. It is the
trial judge saw and heard the witnesses and there is a bar to
position to judge their credibility from the evidence.
He must not interfere with the province of the jury in the
minution of the facts, unless we are prepared to say that the ver-
dict is against the manifest weight of the evidence.
Defendant contends that plaintiff, and the facts, as
guilty of contributory negligence, as a matter of fact. The ques-
tioning of the jury as to the contrary. It is held, where it is
evidence, it was clearly a question of fact for the jury. The
verdict, we are satisfied, is not against the manifest weight of
the evidence. Kelly v. Chicago & North Western Co., 348 Ill. 184;
Kelly v. Chicago City Ry. Co., 343 Ill. 640; Gill v. N. Y. & A.
St. L. R. Co., 343 Ill. 455; Tombs v. Lewis, 307 Ill. 181.
Defendant complains that it was not permitted, in the

presence of the jury, to show that plaintiff had been paid \$3,000 in consideration of a covenant not to sue his employer, the railway company, and that the amount should have been deducted from the award by the jury. The record discloses a stipulation that such sum had been paid was entered into out of the presence of the jury, and the court did not permit the payment to be considered by the jury. The cases relied upon by defendant are those of joint tort-feasors, and the rule is not applicable where the payment is made by one not a joint tort-feasor but under a special statute imposing liability upon an employer, such as the Workmen's Compensation Act, with which this defendant had no connection or concern. Scharfenstein v. Forest City Knitting Co., 253 Ill. App. 190, and cases there cited. Devaney v. Otis Elevator Co., 251 Ill. 28.

Complaint is made with respect to the redirect examination of plaintiff, wherein he was asked what Dr. Callahan, the attending physician, recommended to him, and the answer was that he should have an operation on his leg. This redirect examination was following the cross-examination, in which the defendant asked plaintiff the following: "Q: And he (Dr. Barnes) told you you could go back to work? A: Yes, sir. Q: And you have never gone back to work, have you? A: No, sir." The court later struck out the answer on redirect examination and admonished the jury to disregard the answer. In the light of the question and answer developed on cross-examination, we do not think that it would have been error for the court to allow the question and answer above shown on redirect examination. Kortylak v. Johnston City B. & L. Assn., 279 Ill. App. 88, and cases there cited. Even if it be considered error we do not regard it as sufficiently serious upon this record to warrant interference with the verdict of the jury.

Defendant cannot take advantage of the effect of the

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... the railway company, and...

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answer elicited on cross-examination and allow an inference to remain with the jury that plaintiff was advised by the doctor that he could go back to work, and then complain because the advice given by Dr. Callahan was shown on redirect examination.

Kortylak v. Johnston City B. & L. Assn., 279 Ill. App. 88.

It is contended that the verdict is excessive. Plaintiff at the time of the accident was 53 years old. He was rendered unconscious in the accident, removed to a hospital, was in shock and required more than one blood transfusion. The x-ray pictures disclosed that a large fragment of bone, about 1 1/2 inches in diameter, was torn from the acetabulum, and the hip bone was forced upward through the hole thus formed; that the pubic bones had been torn apart and were separated by a distance of approximately 2 1/2 inches, when normally they are only separated 1/4 to 1/2 inch. There was also a rupture of the sacro-iliac joint in the back and fractures of the pubic bones as well as of the ilium. The diagnosis made by the examining physician showed a comminuted fracture of the pelvis, complete dislocation of the left femur at the hip joint, contusions of the left leg and foot. The record discloses a considerable amount of pain and suffering, directly resulting from these injuries. He was in the hospital about 9 weeks and remained at home in bed 5 weeks thereafter. About a year after the accident other x-ray pictures taken showed a compression fracture of the twelfth dorsal vertebra. The accident occurred May 6, 1944. At the time of the trial October 10, 1945, the patient walked with an abnormal gait. The wide separation of the pubic bones was still present, and when he walked or sat in a hard chair, he suffered pain through his hips, back and legs. He was shown to be permanently disabled from resuming his occupation as a railroad man and unable to perform physical labor. His earnings at the time of the accident averaged \$300 per month. In the face of these injuries and his loss of earnings, we are constrained to hold

answer elicited on cross-examination and also on direct examination to remain with the jury that plaintiff was advised by the doctor that he could go back to work, and then collapsed because the advice given by Dr. Gellman was based on medical examination.

Hortel v. Johnston City B. & L. Assn., 254 Ill. App. 3d.

It is contended that the verdict is excessive. Plaintiff at the time of the accident was 33 years old. He was married and unconscious in the accident, removed to a hospital, was in hospital and required more than one blood transfusion. A x-ray examination disclosed that a large fragment of bone, about 2 1/2 inches in diameter, was torn from the acetabulum, and the hip bone was forced inward to such the hole of the bone; and the hip bone had been torn apart and were separated by a distance of approximately 2 1/2 inches, when usually they are only separated 1/4 to 1/2 inch. There was also a rupture of the sacro-splenic joint in the back and fracture of the pubic bone and a small piece of the ilium. The diagnosis made by the examining physician showed a comminuted fracture of the pelvis, complete fracture of the left femur at the hip joint, contusion of the left leg and foot. The record disclosed a considerable amount of pain and suffering directly resulting from these injuries. He was in the hospital about 9 weeks and remained at home in bed 4 weeks thereafter. About a year after the accident of a permanent disability was a comminuted fracture of the right tibia and fibula. The accident occurred May 6, 1944. At the time of the accident, 10, 1943, the patient suffered with a chronic condition, and wide separation of the pubic bones and still present, and when he walked or sat in a hard chair, he was in pain through his hips, back and legs. He was unable to walk and was disabled from resuming his occupation as a welder and was unable to perform physical labor. His earnings at the time of the accident averaged \$300 per month. In the last of these injuries and his loss of earnings, we are constrained to hold

that the verdict was not excessive but fully justified. Howard v. Baltimore & O. C. Terminal R. Co., 327 Ill. App. 83; Princell v. Pickwick Greyhound Lines, 262 Ill. App. 298; Schneiderman v. Interstate Transit Lines, Inc., 326 Ill. App. 1.

It is urged that plaintiff's instructions Nos. 14 and 6 are erroneous and require a reversal of the judgment. Instruction No. 14 reads: "If you believe from the evidence that any witness in this case has knowingly and wilfully sworn falsely on this trial to any matter material to the issues in this case, as elsewhere defined in these instructions, then you are at liberty to disregard the entire testimony of such witness, except insofar as it has been corroborated - if you find it has been corroborated - by other credible evidence or by facts and circumstances proved on the trial". People v. Flynn, 378 Ill. 351, and People v. Wells, 380 Ill. 347, relied on by defendant to support their objection, do not apply in the instant case, because by other instructions, the material issues in the case were defined to the jury. Defendant's instructions Nos. 6 and 7 also defined the material issues to the jury. The jury, therefore, could not be misled by instruction No. 14. Kavanaugh v. Washburn, 320 Ill. App. 250 at p. 253; Hannah v. Blue Cab Co., 322 Ill. App. 277; Schneiderman v. Interstate Transit Lines, Inc., No. 43216 (opinion filed concurrently with this opinion).

Instruction No. 6, for plaintiff, told the jury what the charge in the complaint was, the complaint consisting of one count. The instruction correctly set out the charge. It is sustained in Goldberg v. Capitol Freight Lines, 382 Ill. 283.

We find no reversible error in this record, and the judgment of the Superior Court is affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

that the verdict was not excessive but fully justified, People v. ...
People v. ...
People v. ...

It is urged that plaintiff's instruction was ...
and erroneous and requires a reversal of the judgment. ...
"If you believe that the evidence is ...
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of course refused to these instructions, ...
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People v. ..., 260 Ill. 24, ...
their objection, as not ...
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to the jury. Defendant's instructions ...
the material issued to the jury. ...
not be aided by instruction No. 12. ...
App. 260 at p. 263; People v. ...
People v. ...
(petition filed concurrently with this ...
Instruction No. 8, for ...
charge in the ...
count. The instruction correctly ...
sustained in People v. ...
"We find no reversible error in the ...

judgment of the Superior Court is affirmed.
...
O'Connor, J., and ...

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GILBERT MEITES,
Appellant,

v.

LEONARD E. MEITES, IRVING J. MEITES,
and MRS. ROSE MEITES, individually
and as co-partners doing business as
THE CHICAGO RECORDER,
Appellees.

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APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

331 I.A. 178

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order of the Superior Court striking the amended complaint and entering judgment for defendants.

A partnership existed between the parties, which on November 21, 1944, was dissolved by the written agreement of the parties, a copy of which dissolution agreement is attached to the amended complaint as an Exhibit. The partnership had previously taken over the business and assets of a corporation in a similar business and assumed its liabilities. On the books of the company it appeared that it was indebted to plaintiff in the sum of \$13,285.16. Plaintiff's theory is that the partnership having assumed the obligations of the company, that it in turn owed plaintiff the amount indicated. Defendants' theory is that the parties settled all of their partnership affairs by the dissolution agreement, and that unless the dissolution agreement preserved the claim plaintiff previously had against the corporation, he could have no claim against these defendants.

The issue, thus narrowed down, must be determined from a proper construction of the dissolution agreement. The agreement provided, among other things, for the division of specific items

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of property of the partnership, unnecessary for this purpose to describe in detail; for the use by plaintiff of part of the premises of the partnership; and that defendants pay plaintiff in cash, in addition to everything else, the sum of \$1434.48 and \$75 due him for the November 1944 drawing account. The paragraph upon which plaintiff's claim is based reads as follows:

"First parties (defendants) hereby assume all obligations of the partnership except the obligations hereby expressly assumed by second party, (plaintiff) and agree to hold second party harmless from any contribution, loss, damages or expenses on account of the partnership obligations * * *."

In no part of the dissolution agreement is the original obligation of the corporation to plaintiff referred to, and if it was intended by the parties that the defendants were to be charged with the amount of that obligation in a settlement of the partnership affairs, it could have been specifically provided for in the agreement as was the item of \$1434.48.

It is clear to us that the language, "First parties (meaning defendants) hereby assume all obligations of the partnership", meant the obligations other than the one of the corporation to plaintiff. This is supported by the language in the same paragraph, "and agree to hold second party (plaintiff) harmless from any contribution, loss, damages or expenses on account of the partnership obligations". Why should they agree to indemnify plaintiff on account of an obligation of the partnership ^{to him?} It does not appear logical and the language will not be ^{so} construed as to make it read illogical or inconsistent with the context of the balance of the agreement, if any other construction would give meaning and import to its consistency.

It is presumed that when partners dissolve a partnership by a written agreement of dissolution, such an agreement unless

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otherwise indicated settles all of the rights, duties and obligations of the parties to each other, and cannot be enlarged upon, by seeking to include an obligation not clearly within the terms of the agreement. It will be presumed that all accounts were taken into consideration. Hamilton v. Wells, 182 Ill. 144 at p. 151.

We believe the judgment of the Superior Court was correct, and accordingly it is affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

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BEL-CLARK BUILDING CORPORATION, a
Corporation,

Appellee,

v.

WILLIAM GLAUNER,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

331 I.A. 179

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in a forcible entry and detainer action, brought by plaintiff to recover possession of an apartment occupied by defendant, his wife and children. The case was tried without a jury.

There was a written lease between the parties, dated March 5, 1945, expiring March 4, 1946, and at the time of the service of the notice to terminate the tenancy, plaintiff was a holdover under the lease. A notice, dated July 2, 1946, served on defendant, listed a total of 15 acts, 7 by the children of defendant and 8 by the defendant, which were charged to be violations of the covenants in the lease, and demanded the violations cease. On July 17, 1946, another notice was served on defendant, which again called attention to continued violations of the covenants of the lease, and stated that plaintiff elected to terminate the lease and demanded possession within 10 days. On August 1, 1946, this action was brought.

It is urged by defendant that the court erred in receiving the lease in evidence, because it was not signed by plaintiff although signed by defendant. The objection is without merit, because upon the trial defendant stated he had no objection to the reception of the lease in evidence. The objection now

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made was overruled in Evans v. Schwartz, 211 Ill. App. 573.

It is next urged that the witness Schuller was not sworn and, therefore, his evidence is incompetent. We do not take this objection seriously, because the record does not show he was not sworn and no objection was made to the competency of the witness at the time he testified nor to the fact that he was not sworn. Under such circumstances the objection can not now be made.

It is next urged that the finding of the court and judgment is against the manifest weight of the evidence. We have examined the evidence. We cannot say that the trial judge, who saw and heard the witnesses and was in a better position to determine their credibility than we, did not correctly decide the cause upon the evidence heard by him. Norkevich v. Atchison, T & S. F. Ry. Co., 263 Ill. App. 1.

It is urged by defendant that the torts, if any, committed by the children, which may be violations of the covenants of the lease, are not chargeable to this defendant unless the evidence shows that he authorized or ratified them, of which, it is said, there is no evidence. As an abstract proposition defendant's position is correct, except that he overlooks the provision of the lease, which states "that the said lessee and those occupying under said lessee will comply with and conform to all reasonable rules and regulations that the lessor may make for the protection of the building or the general welfare and comfort of the occupants thereof". His children are included in the provision of "those occupying under said lessee". There is conflict in the evidence as to the acts of waste committed by defendant, and violation of the printed rules and regulations made a part of the lease constituting

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a breach of the covenants of the lease. Again we must suggest that the court heard the witnesses, and we cannot say that the finding of the court is against the manifest weight of the evidence.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

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DAVID W. HANKINS and GERTRUDE
L. HANKINS,

Appellants,

v.

WILLIAM H. DE PUE,

Appellee.

)
) APPEAL FROM COUNTY
) COURT, COOK COUNTY.
)

831 I.A. 100

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This action was commenced originally before a justice of the peace in Cook County, who entered a judgment in favor of plaintiffs, against defendant, for money due and owing plaintiffs, from which defendant appealed to the County Court of Cook County. Defendant thereafter served a notice by mail to one of the plaintiffs, that he would appear on December 1, 1944, and move to dismiss the case for failure to file an appearance. On December 1, 1944, an order was entered dismissing the case. On March 22, 1946, pursuant to notice to defendant's attorney, plaintiffs, through their attorneys, moved to vacate the said order of dismissal. On April 20, 1946, an appearance for plaintiffs was filed by their attorneys. Hearings on this motion were had, and on April 22, 1946, the order of December 1, 1944, dismissing the suit, was vacated. No appeal was taken from that order. On May 13, 1946, the case was set for trial on June 14, 1946. The case came up regularly for hearing, and both plaintiffs and defendant proceeded to a trial of the case upon its merits, a jury being waived. Evidence was heard and arguments were made. At the conclusion of the trial, the court found the issues for plaintiffs and against defendant, and entered judgment for plaintiffs for \$500.00. No appeal was taken from said judgment.

On June 26, 1946, defendant filed a sworn petition alleging that the case had been dismissed on December 1, 1944, after due notice to plaintiffs, that no appearance had been filed, and

DAVID M. HARRIS and others

Attorneys

VIRGINIA, D.C. 20001

This action was filed in the District Court of the District of Columbia on June 1, 1964.

The parties to this action are the District of Columbia and the following named parties:

1. The District of Columbia, by and through its Attorney General, ROBERT K. MCGOWAN, Jr.

2. The District of Columbia, by and through its Attorney General, ROBERT K. MCGOWAN, Jr.

3. The District of Columbia, by and through its Attorney General, ROBERT K. MCGOWAN, Jr.

4. The District of Columbia, by and through its Attorney General, ROBERT K. MCGOWAN, Jr.

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17. The District of Columbia, by and through its Attorney General, ROBERT K. MCGOWAN, Jr.

18. The District of Columbia, by and through its Attorney General, ROBERT K. MCGOWAN, Jr.

19. The District of Columbia, by and through its Attorney General, ROBERT K. MCGOWAN, Jr.

On June 26, 1964, the District Court of the District of Columbia entered an order granting the motion for summary judgment filed by the District of Columbia.

The case was then dismissed on December 1, 1964, after

the notice to plaintiffs, that no appearance had been filed, and

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that the court was without jurisdiction to enter its orders of March 22, 1946, April 22, 1946, and the final judgment of June 14, 1946, and praying that all of said orders and judgment be vacated. An answer was filed to the petition, and upon a hearing the court on September 17, 1946 entered an order vacating the orders and judgment last mentioned, from which plaintiffs appeal.

Assuming that the court on April 22, 1946, had lost jurisdiction of the person, because the term had gone by after the suit had been dismissed on December 1, 1944, and, assuming further, that the court on May 13, 1946, had no jurisdiction to set the trial for June 14, 1946, yet on the latter day, the parties voluntarily submitted to a hearing, evidence was heard, arguments were made, and the trial completed, without, so far as the record shows, any objection made to the hearing.

There can be no question that the court had jurisdiction of the subject matter but not the persons on April 22, 1946, or on May 13, 1946, but it acquired jurisdiction of the persons on June 14, 1946, when, as indicated, the parties voluntarily submitted to a trial. In this state of the record the law is clear, and our conclusion is governed by the decision in Groves v. Ill. Pub. & Printing Co., 327 Ill. App. 544, wherein this court said:

"While the court was without jurisdiction to enter the order of March 15, 1940, vacating the order of dismissal of August 7, 1934, this question was waived when afterward both parties appeared before the master and Special Commissioner and participated in a number of hearings."

The judgment order of the County Court entered on June 14, 1946, from which no appeal was taken, remains in full force and effect, and the order entered September 17, 1946, is reversed.

REVERSED.

O'Connor, P. J., and Niemeyer, J., concur.

43995

PEOPLE OF THE STATE OF ILLINOIS,
ex rel THORA SWANSON,
Appellee,

v.

CITY OF CHICAGO, A Municipal Corporation,
et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Thora Swanson filed her petition in the Circuit Court of Cook County for a writ of mandamus to compel defendants to restore her license, for the year 1946, to operate a massage parlor, the Mayor of the City having exercised his authority to revoke the license under the ordinances of the City governing the issuance of a license for and the regulation of massage parlors. An answer was filed by defendants, and upon a hearing without a jury, the court awarded the writ.

In the view we take upon this appeal, it becomes unnecessary for us to discuss the facts upon which the Mayor of the City acted in revoking the license. The license, by its terms, expired December 31, 1946. The questions presented upon this appeal therefore become moot, and the appeal should be dismissed. Tuttle v. Gunderson, 341 Ill. 36. The effect of the dismissal of this appeal upon any future application for such a license by this petitioner is treated and disposed of in People v. City of Streator, 258 Ill. 273 at page 274.

Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

O'Connor, P. J., and Niemeyer, J., concur.

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43977

SAM GOROWAY,

Appellee,

v.

ELIZABETH SHELBY,

Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

331 I.A. 131

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in a forcible detainer action that plaintiff have and recover from the defendant possession of an apartment occupied by defendant.

Her occupancy of the apartment was under written leases renewed yearly to May 1, 1945. Thereafter she occupied the premises with the landlord's assent and paid the monthly rental of \$100 designated in the lease. She thereby became a tenant from year to year. In December 1945 or January 1946 the then owner of the premises sold same to plaintiff, who applied for and obtained a certificate of eviction under the Emergency Price Control Act of 1942, as amended, which provided that action to remove or evict the tenant shall **not be** commenced sooner than 6 months after January 13, 1946, and that the purpose for which eviction of the tenant was authorized was for use and occupancy by the purchaser. A copy of this notice was received by defendant from the O.P.A. in April, 1946. In due course of mail defendant received from plaintiff a letter dated February 26, 1946, stating: "Please be advised that your lease will not be renewed. You will receive in due time, a notice to vacate, from the Office of Price Administration. In the interim, you will remain as a month-to-month tenant, the reason being that the new owner desires your apartment for his own use, and occupancy." On July 30, 1946, notice of termination of tenancy was served on defendant personally, advising her that her tenancy of the apartment "will terminate on the 31st of August, A.D. 1946, and you are now hereby

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required to surrender possession of said premises to me on that day." Defendant having failed to surrender possession, action of forcible detainer was commenced September 5, 1946. After trial, judgment was entered September 19, 1946, the writ of restitution being stayed to October 31, 1946, and leave given to defendant to pay rent without prejudice to plaintiff.

Defendant objects that certain notices required under O.P.A. regulations in reference to the institution of suit, etc., were not served. As the O.P.A. regulations specifically provide that the notices referred to by defendant are not required where a certificate relating to eviction has been issued, as in the present case, the objection is not tenable.

Defendant also sought to question the good faith of plaintiff in wanting the premises for his own use and occupancy, and thereby to destroy the effect of the certificate issued under the regulations. This testimony was properly rejected. Bochner v. Rosen, 326 Ill. App. 382.

It is also objected that the notice of February 26, 1946, terminating the year to year tenancy as of April 30, 1946, is ineffective because not served in accordance with section 10, chapter 80, Illinois Revised Statutes. The section relied upon provides that any demand may be made or notice served by delivering a copy thereof to the tenant, or by leaving the same with some person above the age of 10 years, residing on or in possession of the premises; or by posting the same on the premises in case no one is in actual possession. The statute does not purport to restrict the making of a demand or the service of a notice to the particular methods stated in the statute. Unlike the case of Barbee v. Evans, 220 Ill. App. 154, there is no dispute in the instant case as to the receipt of the notice terminating the year to year tenancy and placing same on a month to month basis. In the written defense filed by the defendant

and in her testimony she expressly admits receipt of the notice of February 26, 1946, or in due course of mail, which would be within a day or two thereafter. The notice having been received within the time specified in section 5 of chapter 80, supra, we hold it sufficient to terminate the year to year tenancy.

The provision in the judgment staying the writ of restitution until October 31, 1946, with leave to defendant to pay rent without prejudice to the plaintiff, was made for the benefit of the defendant and acceptance of the condition was optional with her. The power of the court to stay the writ of restitution is not questioned. In Jordan v. Mehl, 324 Ill. App. 305, this court held that a justice of the peace had no power to stay the writ in a forcible detainer action. That case is not applicable to the case at bar.

The judgment is affirmed.

JUDGMENT AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

43987

WILLIAM V. BARNETT and ALBERT H.
BARNETT,

Appellants,

v.

HARRY D. LEVY and LESTER LEVY,
doing business as CARPET AGENCY,
Appellees.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

3311A. 181²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an adverse judgment in their action of forcible detainer to recover possession of commercial property occupied by defendants under a written lease.

The lease provided for the payment of rent in quarterly instalments in advance. In making the instalment payment due September 1, 1946, defendants tendered payment of four months' rent less a deduction of \$10.40 for repairs made by them. The inclusion of the additional months' rent was made by defendants in order to change the dates of the quarterly payments. Plaintiffs refused to acquiesce in this change and, in accordance with the provisions of the lease, refused to permit the deduction for repairs. A second tender of rent for three months, less the repairs, was rejected. This rejection was followed by a notice of forfeiture of the lease. Before institution of suit defendants tendered the rent to the person designated in the lease to receive rent. This tender was refused. On the trial a further tender was made. During the cross-examination of one of the plaintiffs it appeared that after the execution of the lease the legal title to the property had been transferred to a trustee, with plaintiffs as beneficiaries of

ILLINOIS
 STATE OF

IN SENATE,
 JANUARY 1, 1888.

REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE

FOR THE YEAR 1887.

CHAS. J. HARRIS, COMMISSIONER.

SPRINGFIELD: PUBLISHED BY THE
 STATE OF ILLINOIS, 1888.

CHAS. J. HARRIS, COMMISSIONER.

REPORT OF THE

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CHAS. J. HARRIS, COMMISSIONER.

REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE

FOR THE YEAR 1887.

CHAS. J. HARRIS, COMMISSIONER.

SPRINGFIELD: PUBLISHED BY THE

STATE OF ILLINOIS, 1888.

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the trust. The case therefore falls within Beach v. Boettcher, 323 Ill. App. 79. The action not having been brought by the holder of the legal title to the premises, the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

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CHARLES G. DITIS,
Appellee,

v.

AHLVIN CONSTRUCTION CO., INC.,
a corporation, et al.,
Defendants.

On Appeal of VERNON E. CROSELL
and JORGEN HUBSCHMAN,
Appellants.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT COOK COUNTY.

3321.A.182

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from orders enlarging the scope of a temporary injunction and denying a motion to dissolve the injunction.

Plaintiff brought suit against the Ahlvin Construction Co., Inc., Martin V. Ahlvin, Vernon E. Crosell and Jorgen E. Hubschman, directors, stockholders and officers of the corporation, for an accounting upon a contract between plaintiff and the corporation under which plaintiff agreed to perform such duties as the corporation might assign to him in connection with the erection by the corporation of 300 dwelling houses on subdivision property in Cook county, for which plaintiff was to receive from the corporation 37 1/2 per cent of the net profits resulting from sales of the houses, or 37 1/2 per cent of the equities remaining in any unsold houses. Shortly after institution of the suit and on May 11, 1945, plaintiff obtained a temporary injunction restraining the individual defendants "from transferring, disposing of, hypothecating, encumbering or in any wise alienating any of the assets, interests, profits, and property of the defendant, Ahlvin Construction Company, and particularly the houses and real estate, set out and described

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in plaintiff's complaint," etc. Approximately a year and a half later a decree was entered, upon trial had before the court, by which the court found that the contract relied upon by plaintiff was in full force and effect; that the real estate and the homes involved in the proceeding were duly and properly sold by the defendant Ahlvin Construction Company, Inc., and said sales, including the sale of eighty homes to the defendants, Jorgen E. Hubschman and Vernon E. Crosell, were not in violation of any rights of plaintiff but were bona fide, valid and binding in all respects; that there was no fiduciary relationship between plaintiff and any of the defendants; that plaintiff is not entitled to recover damages from any of the defendants. It was ordered, adjudged and decreed that plaintiff have an accounting from the defendant corporation; that plaintiff's claim for damages be denied, and that the sales of the real estate by the defendant corporation, including the sale to the defendants Crosell and Hubschman, were bona fide, valid and binding in all respects. No reference whatever to the injunction was made in the decree. Jurisdiction was retained to supervise the accounting, etc.

Shortly thereafter the defendants Crosell and Hubschman, appellants (hereafter referred to as defendants), filed a petition setting up uncertainty as to the scope and intent of the injunctive order and asking for its clarification so that in the event defendants sold or disposed of the real estate conveyed to them by the corporation they would not be declared in contempt of court. On January 20, 1947 an order was entered on this motion of defendants enlarging the injunction of May 11, 1945 to restrain the defendants from transferring, disposing of, encumbering or in any way alienating any of the completed dwelling houses which are a part of the subject matter of this litigation. On the same day defendants' alternative

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motion to dissolve the injunction of May 11, 1945 was denied. Defendants immediately filed an appeal bond conditioned upon prosecution by them with effect of their appeal from the order denying their motion to dissolve the injunction. Within the time prescribed by statute and the rules of court, the abstract of record and briefs of defendants were filed in this court. Plaintiff filed a motion to dismiss the appeal on the ground that the order enlarging the injunction and refusing to dissolve it as enlarged having been entered after the entry of the final decree, the orders were not interlocutory orders and no appeal could be taken under section 78 of the Civil Practice Act. The decree of December 26, 1946, fixing the rights of the parties, directing an accounting and specifying the terms and conditions thereof, is an appealable order and conclusive of the rights of the parties in respect to the matters therein determined unless appealed from or modified within the time specified in the statute. The final decree will be the decree entered on the accounting between the parties. The purpose of the temporary injunction issued May 11, 1945 was to preserve the status quo until the final determination of the rights of the parties. This could not be determined until the final accounting between the parties as directed by the decree. The order of May 11, 1945, therefore, did not become functus officio upon entry of the decree of December 26, 1946, and the appeal of the defendants was properly taken in accordance with the provisions of section 78 of the Civil Practice Act.

Plaintiff further objected that the appeal of the defendants is restricted to an appeal from the order denying the motion to dissolve the injunction because the condition of the bond filed is limited to the prosecution of the appeal from that order and no mention is made of an appeal from the order enlarging the injunction. The statute regulating appeals from

interlocutory orders specifically provides that no notice of appeal need be filed in perfecting such appeals, and plaintiff contends that the bond required on such appeals takes the place of the notice of appeal in other cases and must state the order or judgment appealed from with the same particularity required in a notice of appeal. As a practical matter it is immaterial in this case whether defendants have successfully appealed from both orders entered on January 20, or only from the order denying the motion to dissolve the injunction. At the time the latter order was entered the injunction sought to be dissolved was the original injunction of May 11, 1945, as enlarged by the order of January 20, 1947, and the dissolution of the injunction would carry with it the subsequent order of enlargement. In the absence of a notice of appeal the scope of defendants' appeal appeared in their brief, filed in accordance with the statute and the rules of court. If the condition of the bond was narrower than the appeal specified in the brief, it was a mere irregularity which defendants should be permitted to correct when and if objection is made. The motion to dismiss the appeal is denied.

Turning to the merits of the cause, we find no valid reason supporting the enlargement of the injunction or the denial of its dissolution. By the decree, which remains unchanged, plaintiff's claim for damages is denied, his right to an accounting is limited to an accounting with the corporation, and the sales of the eighty homes to the defendants are held to be bona fide, valid, binding and of full effect. Defendants are decreed to be under no liability to the plaintiff, and no reason is found in the record or suggested by counsel why their individual property should be retained for the satisfaction of a claim which might be established on the accounting against the corporation only.

The orders of the court appealed from, enlarging and

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refusing to dissolve the injunction of May 11, 1945, insofar as said orders restrain or enjoin any disposition, transfer, sale or encumbrance of any of the real estate and homes found and decreed to have been legally and properly sold by the corporation to the defendants, are reversed. The cause is remanded with directions to dissolve the injunction in accordance with the views herein expressed.

ORDERS REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Feinberg, J., concur.

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43601

In the Matter of the Estate
of BENJAMIN HERSHON, Deceased.

ANNE HERSHON,

Petitioner - Appellee,

v.

MAXINE HERSHON, as Administratrix
of the Estate of BENJAMIN HERSHON,
Deceased,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3311A.26

MR. PRESIDING JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court entered April 6, 1945, removing Maxine Hershon, hereinafter called "defendant", as administratrix of the estate of Benjamin Hershon, deceased, for committing waste and mismanaging the estate of the deceased and for conducting herself in such a manner as to endanger the sureties on her bond, in violation of paragraph 3, section 430, chapter 3 of the Probate Court Act. On appeal from the Probate Court the cause was heard and determined by the Circuit Court solely on the record of the proceedings in the Probate Court.

The record discloses that after a lengthy hearing in the Probate Court on objections filed by the petitioner, Anne Hershon, to accounts filed by defendant as administratrix of the estate of Benjamin Hershon, deceased, an order was entered on June 23, 1943 directing the defendant, among other things, to deposit with the American National Bank and Trust Company in her account as administratrix the sum of \$2,279.61, and that upon the failure of the defendant as administratrix to deposit that sum as directed within five days then the Globe Indemnity Company, as surety for defendant, shall deposit the aforesaid sum. Afterwards on July 8, 1943, an order was entered in the Probate Court on defendant's motion extending the time for appeal from the

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order of June 23, 1943 to July 16, 1943. Defendant did not perfect the appeal.

In October 1943 petitioner filed a petition praying that defendant be held in contempt for failure to comply with the order of June 23, 1943, and that she be removed as administratrix. Defendant answered, denying any act of waste or mismanagement and that she conducted herself in any manner so as to endanger her sureties of the estate.

On November 24, 1943, after a hearing on the foregoing petition and answer, the court found the defendant guilty of contempt for having "willfully failed and refused to comply with the order of June 23, 1943," and sentenced her to the common jail of Cook County for one year. The court stayed the mittimus.

On September 26, 1944 defendant filed a petition to vacate and set aside the order entered on June 23, 1943. The petitioner answered, averring that more than fifteen months had elapsed since the entry of the order of June 23, 1943 and that the court lacked jurisdiction to modify or change the order.

In its answer the Globe Indemnity Company averred "it did on July 23, 1943, as surety for Maxine M. Hershon, as administratrix of said estate, deposit with said American National Bank and Trust Company the sum of \$2,279.61 from its own funds, for credit to the account of the said administratrix; that said Maxine M. Hershon has not paid said sum or any part thereof to this respondent."

On October 25, 1944 an order was entered by the Probate Court denying defendant's petition to vacate the order of June 23, 1943 and revoking the letters of administration heretofore issued to defendant as administratrix of the deceased's estate. Defendant appealed to the Circuit Court from this order.

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On April 6, 1945 the Circuit Court found: (1) that the order of the Probate Court of June 23, 1943 was an appealable order; that subsequent to the entry thereof defendant caused an order to be entered in the Probate Court, extending her time to appeal from said order, to July 16, 1943; that no appeal was taken within the statutory time nor within the time of such extension: (2) that the petition to vacate said order was filed in the Probate Court on September 26, 1944; that the filing of said petition did not extend the time to appeal from the order entered June 23, 1943; that it was within the sound discretion of the judge of the Probate Court to pass upon that petition; that on October 25, 1944 the Probate Court denied the relief prayed in said petition; that from the pleadings and evidence in this cause this court is not warranted in finding any abuse of discretion by the judge of the Probate Court: (3) that the order of June 23, 1943 constituted an adjudication to the effect that defendant as administratrix was accountable to the estate in the sum of \$2,279.61; that it was within the sound discretion of the Probate Court to remove her as administratrix; that the judge of the Probate Court exercised that discretion by entering the order of October 25, 1944; and that from the evidence and pleadings this court is not warranted in finding any abuse of discretion by the Probate Court in entering said order.

Defendant's principal contention is that the order of the Probate Court entered on June 23, 1943, from which no appeal was taken, may be attacked at any time before the estate of Benjamin Hershon, deceased, is closed. In support of her position defendant's counsel cites Ford v. Ford, 117 Ill. App. 502; Estate of Turner, 275 Ill. App. 366; and Estate of Braje, 294 Ill. App. 377. These cases involved proof of heirship and the facts are dissimilar to those in the case at bar. In the Braje case the court held that

On April 2, 1968, the following was received from the

Director of the Federal Bureau of Investigation, Washington, D.C.

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On April 2, 1968, the following was received from the

Director of the Federal Bureau of Investigation, Washington, D.C.

Re: [illegible] [illegible] [illegible] [illegible] [illegible]

On April 2, 1968, the following was received from the

Director of the Federal Bureau of Investigation, Washington, D.C.

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On April 2, 1968, the following was received from the

Director of the Federal Bureau of Investigation, Washington, D.C.

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On April 2, 1968, the following was received from the

Director of the Federal Bureau of Investigation, Washington, D.C.

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On April 2, 1968, the following was received from the

Director of the Federal Bureau of Investigation, Washington, D.C.

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On April 2, 1968, the following was received from the

Director of the Federal Bureau of Investigation, Washington, D.C.

Re: [illegible] [illegible] [illegible] [illegible] [illegible]

On April 2, 1968, the following was received from the

Director of the Federal Bureau of Investigation, Washington, D.C.

Re: [illegible] [illegible] [illegible] [illegible] [illegible]

On April 2, 1968, the following was received from the

Director of the Federal Bureau of Investigation, Washington, D.C.

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On April 2, 1968, the following was received from the

Director of the Federal Bureau of Investigation, Washington, D.C.

Re: [illegible] [illegible] [illegible] [illegible] [illegible]

the Probate Court may, even after the entry of an order closing the estate, in the exercise of equitable powers, set aside any order procured by fraud or due to accident or mistake. To the same effect is Schmalz v. Estate of Strang, 298 Ill. App. 427. No allegations of fraud or mistake are made in defendant's petition to vacate the order of June 23, 1943. Defendant concedes that it was an appealable order. (Randolph v. The People, 130 Ill. 533.) She did not avail herself of an appeal in accordance with Section 484 of Chapter 3 of the Probate Court Act. The petition filed fifteen months afterwards is an attempt by defendant to relitigate the same questions raised, argued and determined by the order of June 23, 1943 from which she failed to appeal. With respect to this order the evidence before the Probate Court shows that the defendant operated the business of the decedent without authority of court, paid expenses relating to the operation of the business without accounting to the court for any of the income produced from the operation thereof; that large sums of money were expended for living expenses for defendant and her children in excess of the amount allowed for widow's award and children's award; that excessive attorney's fees and administrator's fees were paid without the approval of the court; and that payments of alleged claims were made without the approval of the court. As a result of defendant's mismanagement of the estate, her surety was obliged to pay the sum the court found due.

In our opinion the evidence amply justifies the removal of the defendant as administratrix, and the discretion of the court was reasonably exercised. (People v. Buck, 149 Ill. App. 283.)

We find no basis for disturbing the findings of the Circuit Court and we conclude it correctly applied the law to the facts found.

For the reasons given, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

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1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know if the study was successful in achieving its objectives and if the results are consistent with their expectations.

43717

CECIL A. CAPLOW,

Appellee,

v.

MAXINE M. HERSHON,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

33 111A 267

MR. PRESIDING JUSTICE LOWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover compensation for professional services alleged to have been performed by plaintiff, a lawyer, under an oral agreement with the defendant. The cause was heard by the court without a jury, resulting in a finding and judgment for \$735 in favor of the plaintiff. Defendant appeals.

The statement of claim, consisting of two counts, alleges, in substance, that defendant is indebted to plaintiff in the sum of \$735 on an account stated and for work performed by him as attorney for defendant upon her request.

In her "defense" defendant denies that there was an account stated, and avers that she was duly appointed administratrix of the estate of Benjamin Hershon, deceased, in the Probate Court of Cook County, Illinois; that on March 23, 1932, as such administratrix, she entered into "an oral agreement" with plaintiff to render legal services to her as such administratrix, and that plaintiff agreed to secure his compensation for such services to her as administratrix from the assets of the deceased's estate.

There is no dispute as to plaintiff's charges of \$135 for services rendered to defendant in certain matters which do not pertain to the administration of the estate. In her brief defendant suggests that a judgment be entered in this court against her for that sum.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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The sole issue presented for determination is whether defendant is personally liable for professional services rendered by plaintiff in connection with the estate of Benjamin Hershon, deceased, for which he claims \$600.

Plaintiff and defendant were the only witnesses. They testified to diametrically opposite versions of the terms of the agreement of employment. Plaintiff testified substantially as follows: About March 20, 1942 defendant came to his office and asked him to "look into" the estate of her deceased husband; that she wanted to engage him to represent her in the estate and to substitute for some attorneys she had theretofore employed. Plaintiff told defendant that he would "check into" the estate and talk with her former attorneys. Two or three days later defendant returned to plaintiff's office and they had a further conversation. On this occasion plaintiff informed the defendant that he "had talked to Getz and Abraham (her former attorneys) and had checked the file and the briefs" in her case. Thereupon she asked plaintiff on what basis he would represent her. Plaintiff replied, "Well, I will undertake to represent you on the basis of what the Probate Court would pay in similar cases, on the basis of no set figure."

The evidence further shows that on direct examination the plaintiff was asked the following question: "What, if anything, was said by you to her with reference to who you would look to for payment for your fees?" Plaintiff replied: "Why, I never said I would look to anyone other than her. We never discussed that -- who I should look to."

Defendant testified that the first time she went to see plaintiff at his office, "I told him (plaintiff) I didn't have any money to hire a lawyer, that my husband died, that I had two children, and that I needed a lawyer to file a current account

The first thing I did was to go to the office.

I was very busy, but I had to go.

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who I should talk to.

He was very busy, but I had to go.

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I was very busy, but I had to go.

for the estate; and he (plaintiff) said, "That is all right, the estate pays lawyer's fees from the estate," and he took the case on the basis of whatever fees he could collect would be paid by the estate."

Defendant further testified that she told plaintiff she had paid Getz, Getz and Abraham the sum of \$500 early in 1940 and had discharged them because she was dissatisfied with Mr. Abraham.

The record discloses that plaintiff filed a first and amended account in the deceased's estate. The amended account shows receipts totaling the sum of \$6,413.89. Plaintiff says he devoted from 116 to 140 hours in preparation of the account, conferences and court appearances. Numerous objections were filed to the account and while these were being contested plaintiff withdrew as defendant's attorney.

Afterward plaintiff filed a petition for attorney's fees under section 337 of the Probate Court Act, Rev. Stats. 1945, ch. 3, sec. 439, which alleged, inter alia, that on March 23, 1942 plaintiff was retained as attorney for the administratrix; that he has never received any compensation whatsoever from the administratrix or from the estate for legal services rendered by him therein and, moreover, the administratrix has indicated that she will not pay the petitioner (plaintiff); that the plaintiff is entitled to a reasonable allowance for attorney's fees for services he has rendered and for which he may never be compensated unless the court will intervene as provided by section 337 of the Probate Court Act of Illinois. The foregoing petition concludes with a prayer that a reasonable allowance be made to plaintiff for attorney's fees on account of legal services rendered and performed by plaintiff and that thereupon such sum be surcharged against the administratrix (defendant) and ordered to be by her replaced in the estate or by

her surety in the event she fails to do so.

In her answer to plaintiff's petition for fees defendant averred that at the time of the alleged employment of plaintiff as attorney for her as administratrix plaintiff was aware of the condition of the estate and the fact that \$500 had already been paid to his predecessors as attorneys; that plaintiff then and there agreed with defendant that he would require no advance fee and would agree to accept the fee fixed by the court, giving due allowance to the \$500 already expended as fees; that plaintiff is not entitled to any compensation as attorney for the administratrix under the terms of the agreement between himself and the defendant at the time of his employment unless by adjustment with the former attorneys for the estate.

After a hearing in the Probate Court on the foregoing petition for fees and defendant's answer, plaintiff's petition was denied on October 24, 1944.

In actions of attorneys to recover compensation for professional services claimed to have been performed under a contract express or implied, the usual rules as to defenses in actions ex contractu generally apply. (5 Am. Jur., sec. 168, p. 362.)

The burden of proof rests upon the plaintiff to establish his case by a preponderance of the evidence. In the instant case the plaintiff's right to maintain his action depends upon the terms of his oral agreement with defendant. The law is well settled that a party holding the affirmative of a proposition is required to maintain it by the preponderance of the evidence, which can never be the case when one of two parties equally credible makes an assertion which is denied by the other. (Broughton v. Smart, 59 Ill. 440; Brady v. Chaffee, 163 Ill. App. 242; Northern Trust Co. v. Parker, 205 Ill. App. 450; Sullivan v. A. H. Andrews Co. 205 Ill. App. 590; McGue v. Flynn, 727 Ill. App. 222.)

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A careful examination of the record does not disclose any evidence tending to corroborate the plaintiff's testimony. On the contrary, the filing of his petition under section 337 of the Probate Court Act, seeking the payment of his fees from funds in the estate, is not, in our view, consistent with the theory urged in the case at bar. If the plaintiff looked solely to defendant for his compensation, as he now maintains, there would have been no occasion for filing a petition praying for fees from the estate.

Application of the principle announced in the cases last cited bars plaintiff from a recovery from defendant of fees for his services rendered to the estate of Benjamin Herahon, deceased.

For the reasons given, the judgment is reversed and the cause remanded with directions to enter judgment for plaintiff and against defendant in the sum of \$135. ~~Costs in the Municipal Court and in this court are to be taxed against the plaintiff.~~

REVERSED. AND REMANDED
WITH DIRECTIONS.

KILEY AND BURKE, JJ. CONCUR.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the activities of the British Security Organisation (BSO) in the United States. It is noted that the BSO is a private organization which has been active in the United States since 1945, and that it has been reported to have been involved in a number of activities which are considered to be of a subversive nature. It is also noted that the BSO has been reported to have been active in the United States since 1945, and that it has been reported to have been involved in a number of activities which are considered to be of a subversive nature.

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43859

WILLIAM E. DECKER, Administrator
of the Estate of IRENE SEKURA,
Deceased,

Appellee,

v.

MICHAEL SEKURA,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

382.4.267

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

After this cause was appealed plaintiff died and William E. Decker was appointed administrator of the estate of Irene Sekura, deceased. Deceased's administrator was thereafter substituted as plaintiff herein. For convenience, however, we shall hereinafter refer to deceased as plaintiff.

By this appeal defendant seeks to reverse an order of the chancellor sustaining plaintiff's action to strike defendant's petition to vacate and set aside a decree of divorce entered at a prior term of the Superior Court, which provided for alimony and solicitor's fees and determined the rights of the parties in certain real estate.

Plaintiff filed her bill for divorce on August 17, 1945, alleging among other things that on August 26, 1944 she was lawfully married to the defendant in Chicago; that they lived together as husband and wife until August 10, 1945; that plaintiff had a daughter by a previous marriage; and that there were no children born of this marriage. The grounds alleged in the bill were extreme and repeated cruelty. On November 14, 1945 a decree was entered by default.

More than four months after the entry of the decree, on March 20, 1946, defendant filed a petition to vacate and set aside the decree of divorce. The petition alleged in substance that defendant was duly served with summons and that he did not

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make an appearance or otherwise answer; that the plaintiff made certain representations to him which he learned, subsequent to the entry of the decree, to be "false and fraudulent"; that in November 1945, when defendant exhibited to plaintiff the summons which he had received in the divorce proceedings, plaintiff advised him that she had withdrawn the complaint and dismissed the cause; that on November 6, 1945, the day on which the cause was heard, the plaintiff was living and cohabiting with the defendant, and on or about November 15, 1945, "on discovering that he had been misled by plaintiff's misrepresentations," defendant moved out of the premises; that after the defendant left the plaintiff she repeatedly urged the defendant "to return, and went to the extent of making plans for their remarriage"; and that the testimony adduced by plaintiff in support of the allegations in her bill of complaint at the ex parte hearing was false.

The sole question presented is whether the divorce decree entered in the instant case can be vacated after the term has elapsed.

Defendant maintains that plaintiff's representations to him that she had withdrawn her complaint for divorce constituted fraud and that the court acquired merely "colorable jurisdiction."

The law is well settled that if the term of court at which a decree is regularly entered has elapsed the court is without power at a subsequent term on motion or petition to vacate or modify the decree in any manner except as to matters of form or clerical errors, and except where a decree is void for want of jurisdiction in the court entering the same. (Sim v. Sim, 247 Ill. App. 321; Williams v. Williams, 320 Ill. App. 591.)

In the present case the decree of divorce was final and, on its face, regular and valid. Several terms of court had elapsed when defendant's petition was filed, although it appears

from his petition that he had knowledge of the entry of the decree immediately thereafter. The exception which permits a court to vacate a prior order contemplates a case where the court had no jurisdiction of the subject-matter or of the parties. (Tosetti Brewing Co. v. Koehler, 200 Ill. 369.) That the court in the instant case had jurisdiction of the defendant cannot be questioned since he admits having been duly served with process. Nor is there any doubt that the cause of action alleged in the complaint falls within the general class of cases over which the authority of the court extends.

Application of the principles announced in the foregoing authorities makes defendant's position untenable.

For the reasons stated, the order is affirmed.

AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

43147

BELLE ISAACS, individually and
as Executrix of the Estate of
Henry Isaacs, Deceased,

Appellant,

v.

HARRY OKIN and ISADORE SHALOWITZ,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

331.1.238

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On October 5, 1943 Belle Isaacs, individually and as executrix of the estate of Henry Isaacs, deceased, filed a complaint in chancery in the Superior Court of Cook County against Harry Okin and Isadore Shalowitz, asking that 92,000 shares of common capital stock of The 12th Street Store Corporation acquired by defendants since May 13, 1938, be declared impressed with a trust in favor of plaintiff either without, or, in the alternative, with payment by her to defendants of an amount to be fixed by the court, and for other relief. Defendants' answers, in addition to denying allegations of the complaint, also set up affirmative matters of defense. The case was heard by the chancellor, who entered a decree dismissing the complaint for want of equity. Plaintiff, appealing, asks that the decree be reversed and that she be awarded the relief prayed in her complaint.

The 12th Street Store was organized as a corporation under the laws of Illinois in 1909 and has since conducted the business of a department store at Roosevelt Road (formerly 12th Street) and Halsted Street in Chicago. Between the date of its incorporation and 1928 certain stock dividends were distributed. In 1928 the articles of incorporation were amended so as to provide a capitalization of 40,000 shares of no par value class "A" preferred

stock, having a declared value of \$25 per share, and calling for an annual \$2 cumulative dividend, and 50,000 shares of class "B" common stock, having a declared value of \$5 per share. Before such recapitalization, all of the shares were common stock. On the recapitalization all of the previously issued common stock was surrendered to the corporation and the stockholders received in lieu thereof the entire authorized class "A" preferred and class "B" common stock. Plaintiff is the widow of Henry Isaacs, one of the original organizers of the corporation, the manager of the store from its beginning, and the president for many years. At the time of the recapitalization the stockholders were Joseph Weissenbach, L. Klein, the family of Sol Klein, Henry Isaacs and plaintiff. These stockholders then sold the entire issue of the class "A" preferred stock (40,000 shares) to Porter Fox & Co., and Minton Lampert Co., dealers in securities in the City of Chicago, for the sum of \$1,000,000 in cash, which money was divided among and between such stockholders in proportion to their holdings. The corporation did not receive any of this money. The stockbrokers then sold the preferred stock to the general public.

About the time of the sale of the preferred stock the stockholders mentioned caused to be incorporated under the laws of Delaware, "The 12th Street Store Corporation", whose stock consisted of 150,000 shares of no par common stock, and thereupon exchanged the entire 50,000 shares of the common stock of the Illinois corporation proportionately for the 150,000 shares of the common stock of the Delaware corporation. The Delaware corporation thereupon became and has continued to be the owner of all the class "B" common stock (50,000 shares) of the Illinois corporation. The purchasers of the preferred stock of the Illinois corporation were given warrants to subscribe for and acquire upon payment of the subscription price fixed in the warrants, one share of the Delaware corporation common stock with each share of the

preferred stock of the Illinois corporation bought by them. To insure delivery of this common stock, the then stockholders deposited pro-rata of their holdings, 40,000 shares of the Delaware corporation common stock with The West Side Trust & Savings Bank, located in Chicago. These warrants to subscribe for the Delaware common stock expired on January 1, 1940. The proceeds of the sale of the escrowed common stock was to be divided pro-rata among the depositors, and it was further agreed that the stock not sold should be returned to the depositing stockholders in the proportion of their respective deposits. The holders of the warrants exercised their right to purchase only 786 shares of the deposited stock, so that at the expiration of the period when their right to subscribe expired, 39, 214 shares of the Delaware common stock remained in escrow. Both the class "A" preferred stock of the Illinois corporation and warrants to subscribe for 40,000 shares of the Delaware corporation stock were thereupon listed and traded in on the Chicago Stock Exchange. While the common stock of the Illinois corporation had comparatively small equity in the assets, it nevertheless had voting control.

Sol Klein had been president of the Illinois corporation from its organization until his death in 1920. Joseph Weissenbach, a well known attorney, then became president and so continued until his death in 1930. He was succeeded in the presidency by Henry Isaacs, who held that office until his death on May 13, 1938. Joseph Weissenbach was a brother of plaintiff. He had been general counsel and attorney for both companies and had been personal attorney for Mr. and Mrs. Isaacs. On the day Mr. Isaacs died, the larger stockholdings in the Delaware corporation, including the proportionate shares of the escrowed stock, were as follows:

preferred stock of the Illinois corporation bought by them. In
 immediate delivery of this common stock, the then shareholders
 cancelled portions of their holdings, 40,000 shares of the Illinois
 corporation common stock with the last five years' dividends paid,
 located in Chicago. These were then to subscribe for the balance
 common stock expired on January 1, 1930. The proceeds of the
 sale of the common stock was to be divided pro-rata
 among the shareholders, and it was further agreed that the stock
 not sold should be returned to the cancelling shareholders in
 the proportion of their respective holdings. The holders of the
 common stock exercised their right to purchase only 100 shares of
 the cancelled stock, so that at the expiration of the period when
 their right to subscribe expired, 39,900 shares of the Illinois
 common stock remained in excess. Also the class "A" preferred
 stock of the Illinois corporation and amounts to subscribe for
 40,000 shares of the common corporation stock were thereupon
 listed and traded in on the Chicago stock exchange. While the
 common stock of the Illinois corporation had nominally equal
 parity in the assets, it nevertheless had voting control.
 Sol Klein had been president of the Illinois corporation
 from its organization until his death in 1930. Joseph Kalsanbach,
 a well known attorney, then became president and so continued
 until his death in 1930. He was succeeded in the presidency by
 Henry Lamm, who held that office until his death on May 18, 1936.
 Joseph Kalsanbach was a brother of Kalsanbach. He had been General
 Counsel and attorney for both companies and had been married
 attorney for Mr. and Mrs. Lamm. On the day Mr. Lamm died,
 the larger stockholdings in the Illinois corporation, including
 the proportionate shares of the common stock, were as follows:

| | |
|---|-----------|
| Henry and Belle Isaacs | 34,209.8 |
| Lawrence Klein, Trustee | 27,742.8 |
| Lawrence Klein | 3,433 |
| Minna and Joseph Weissenbach | 48,354.04 |
| Irving N. Klein | 4,950.06 |
| Cora K. Lewis | 11,137.12 |
| Trustee for Edwin M. Klein | 1,857.49 |
| Conservator of Estate of Edwin M. Klein | 3,092.57 |
| " " Florence L. Klein | 11,137.12 |
| Porter Fox | 3,300.00 |

There were also small holdings of an aggregate of 786 shares. In excess of 29/30th of all stock of the Delaware corporation was owned by various members of the Weissenbach, Klein and Isaacs families, who were inter-related by blood or marriage. Henry Isaacs, because of his friendly relations with the other family groups, was at all times secure in his position as president and manager. The company suffered substantial losses during the depression. Only a \$1 dividend, instead of \$2, was paid on the preferred stock in 1931 and no dividends were paid thereon since that time. The cumulative dividends on the outstanding preferred shares, which had been reduced from the original 40,000 to 36,675 at the time of Mr. Isaacs' death, approximated one half million dollars. In 1933 James Walsh, who had previously been in the employ of the Illinois corporation, was recalled and made general manager, which position he thereafter continuously held until his election as president in June, 1938. His association with the store terminated in 1940. As an inducement to persuade his return in 1933, in addition to a substantial salary, he was, by the stockholders, given 10,000 shares of the common stock of the Delaware corporation. While in some of the years between 1931 and 1938 nominal profits resulted, at the time of Mr. Isaacs's death in 1938, there was a deficit in the capital structure as disclosed by the companies books, without taking into consideration the accumulated preferred dividends, of \$321,067. An exhibit introduced by plaintiff giving details of the company's operations from January 7, 1938 to June 25, 1938 (23 weeks) showed an operating deficit of \$5,189.86.

Harry Okin was admitted to practice law in 1910. At that time he became associated with the law firm of McKwen, Weissenbach, Shrimski & Meloan, of which Mr. Joseph Weissenbach was senior partner. Mr. Okin became a member of the firm in 1912. He was elected a director of the Illinois corporation and also of the Delaware corporation in 1929 and has since continuously acted as such director. At the same time he was elected secretary of each corporation and held such office until 1938, when he was elected chairman of the board of the Illinois corporation and president of the Delaware corporation. In 1940 he was elected president of the Illinois corporation and has continued in that office. Shortly after the stock was listed he bought on the open market approximately 1,000 shares of preferred stock of the Illinois corporation at prices ranging from \$25 to \$29.50 per share, so that he had an investment in the preferred stock of the Illinois corporation of something better than \$25,000. Isadore Shalowitz, the other defendant, was also a preferred stockholder in the Illinois corporation and a director in both corporations. Upon the death of Joseph Weissenbach in 1930, Okin succeeded him as general counsel for both corporations. For some years he received a retainer from the Illinois corporation for services rendered as general counsel. He was also personal attorney for Jules Ladany, a son-in-law of Mr. and Mrs. Isaacs, and who was the attorney for the Vienna Sausage Company, which was owned by Mr. Ladany and which was a substantial and successful concern. He was a close friend of and attorney for Mr. and Mrs. Isaacs. During Mr. Isaacs's lifetime there was the closest cooperation between the family groups, which controlled substantially all of the stock of the Delaware corporation, namely, the Weissenbach, Klein and Isaacs groups. Okin became the attorney for plaintiff, individually and as executrix, and undertook her representation and that of members of her family in connection with the probate of the estate. In October, 1938 the defendants purchased 92,282 shares in the Delaware

corporation for \$35,904.08. This is the stock which plaintiff, in her complaint, asks to have impressed with a trust in her favor.

At the time of the trial plaintiff was 73 years of age. She had three sons-in-law. Walter Metz had been married to her daughter for ten years and was in the employ of the store "during 1928 to 1930." Thereafter, he worked for several agencies soliciting life insurance and at the time of the trial was connected with a concern in the fluorescent light manufacturing business. Harry Newman, a son-in-law for 20 years, had been for the previous 19 years connected with Paine, Webber, Jackson & Curtis as a stockbroker, and as such broker had dealt in The 12th Street Store stock. He testified that the preferred stock of the Illinois corporation at the time of Mr. Isaacs's death was selling at "around \$3 a share"; that the common stock of the Delaware corporation "was not selling"; and that "there was no market for it." Jules Ladany, a son-in-law for 15 years, was president of the Vienna Sausage Company, whose place of business was near The 12th Street Store. Mr. Isaacs died on May 13, 1938. Interment of the body was at Rosehill Cemetery on May 16, 1938. He died on a Friday and the interment took place on a Monday. Plaintiff introduced evidence that on the evening of the funeral "memorial services were held at the Shereland Hotel in the Isaacs's apartment; that after the memorial services Mrs. Isaacs's three daughters and sons-in-law joined her in her bedroom and Okin came into the room; that the plaintiff told him that she would like to buy a controlling interest in the stock of the Delaware corporation and suggested that she ought to speak to Mr. I. B. Lipson, who represented the Klein and Weissenbach stockholdings"; that "Okin told Mrs. Isaacs, according to her testimony and that of her daughter Ruth and sons-in-law, that he was her attorney; that she should leave it all to him; and under no circumstances to speak to Mr. Lipson or any other stockholders." Okin denied that he was present at that meeting,

corporation for \$33,004.08. This is the sum which plaintiff
in her complaint, seeks to have returned with a profit in her claim.
At the time of the trial plaintiff was 75 years of age.
She had three sons-in-law. After her husband's death she was
daughter for ten years and was in the custody of the latter. During
1928 to 1930. Thereafter, he worked for several agencies
collecting life insurance and at the time of the trial was connected
with a concern in the insurance field operating business.
Harry Brown, a son-in-law for 20 years, had been for the previous
12 years connected with same, being a partner in a
stockholder, and as such had been in the firm from 1918
stock. He testified that the defendant owned of the Illinois
corporation at the time of Mr. Brown's death was selling at
"around 25 a share"; that the common stock of the defendant corporation
was not a thing; and that there was no market for it.
Jules Leary, a son-in-law for 15 years, was president of the
Vienna Savings Company, where since its liquidation in 1927
street store. Mr. Leary died on May 11, 1933. Plaintiff on the
body was at Marshall Cemetery on May 16, 1933. He died on a hill
and the informant took place on a bench. Plaintiff introduced
evidence that on the evening of the funeral "several persons
were held at the Danvers Hotel in the house's apartment; that
after the funeral services Mrs. Brown's three daughters and sons-
in-law joined her in her bedroom and this took place in the room; that
the plaintiff told him that she would like to buy a controlling
interest in the stock of the defendant corporation and suggested that
the ought to speak to Mr. J. E. Lipson, who represented the firm
and Leary's stockholders"; that "this told Mrs. Leary,
according to her testimony and that of her daughter Ruth and son-
in-law, that he was her attorney; that she should leave it all to
him; and under no circumstances to speak to Mr. Lipson or any other
stockholders." This was said that he was present at that meeting.

although he admits he was at the Isaacs's apartment on the day of the death, the following day and the day after. A corroborative witness for plaintiff and a family friend, Aaronson, testified that he recalled seeing Okin at the memorial services at the Isaacs's apartment on the evening of the funeral. The chancellor stated that he did not believe any meeting occurred on the evening of the funeral.

Okin denied that he attended the memorial services or was at the Isaacs's apartment on the day of the funeral. He testified that he attended the funeral services at Rosehill Cemetery on Monday, and being "fagged out," did not go to the Isaacs's apartment that evening. He stated further that he lived in Glencoe and was at home on that evening. Mr. I. B. Lipson, a reputable Chicago lawyer who has been in active practice for 40 years, represented Minna Weissenbach, widow of Joseph Weissenbach, and members of the Klein family. He was elected a director of the Illinois corporation in 1931 or 1932 and continues as such director. Plaintiff's witnesses as to the bedroom conference testified that Mr. Lipson was in the apartment that evening at the time Okin was there, but that he, Lipson, was not called into the conference. Mr. Lipson testified that he attended the funeral; that he paid one condolence visit to the home at the Shoreland Hotel, which was in the afternoon; and that he did not recall seeing Okin there. He stated that his visit was on a Sunday afternoon. In the recent case of Coppens v. Coppens, 395 Ill. 326, the court said (332):

"The chancellor heard the testimony in open court and had an opportunity to see the witnesses and listen to their testimony from the stand and we will not reverse his findings unless we are able to say that they are palpably contrary to the weight of testimony. (Hadley v. White, 367 Ill. 406; Cook v. Wolf, 296 Ill. 27.) Where the evidence is conflicting and witnesses are heard in open court, an error in finding as to the facts must be clear and palpable to authorize a reversal. Rothenberg v. Rothenberg, 378 Ill. 242; Elmstedt v. Nicholson, 186 Ill. 580."

After a careful examination and study of the transcript of the testimony, we are satisfied that the findings of the chancellor on the facts are supported by the record. Such findings are not contrary to the weight of the evidence.

There was testimony that when Mr. Isaacs died, Ladany, one of his sons-in-law, told plaintiff that her position might be changed because of her husband's death; that she ought to get in touch with some of the other stockholders and directors with whom her husband had been in closer contact than she; and that she ought to consider either buying more stock in order to obtain a controlling interest in the Delaware corporation, or else sell her holdings. There was testimony that she discussed the matter with her sons-in-law and that all agreed to pursue the course suggested by Ladany. Shortly after the death of Mr. Isaacs plaintiff and the sons-in-law met at Okin's office and requested that one of them be made a director to represent the Isaacs interests. Okin objected to having either Metz or Newman on the board; and stated that it was inadvisable to elect a new director before the next annual meeting in March, 1939. He suggested that Ladany sit in as an advisory director without voting power. Plaintiff at that time requested that Metz be given a position in the conduct of the business. Okin said he would not consent to having Metz in the business.

Defendant Shalowitz for years had been in the employ of the store. He was the comptroller and auditor, had charge of the books and finances and counseled with the president in respect to merchandising. He was also a director and a personal adviser and confidant of Mr. Isaacs in his lifetime and of Mrs. Isaacs. He had handled some of her financial affairs as well as those of Mr. Isaacs. At the time of Mr. Isaacs's death the store was operating at a loss; the leasehold was imperiled by existing defaults; the preferred stockholders were restless and dissatisfied; the employees were uncertain as to the continuance of their positions and their morale was being undermined. Okin testified that he was concerned because of his investment in the preferred stock of the Illinois corporation; that

[illegible]

also in appreciation of his obligation as a director he considered taking the initiative in doing something constructive; that he had no desire to give up his law practice or any part of it; and that he first approached Mr. Lipson, who represented the "Klein-Weissenbach" holdings consisting of about 42% of the Delaware corporation stock. There were discussions between Okin and Lipson about the need for new management. Some of these discussions took place prior to the death of Mr. Isaacs, Lipson testified that he told Okin in March or April, 1938 that what the store needed was "somebody that had an investment in the stock," and that he, Lipson, initiated that conversation. On cross-examination by the attorney for plaintiff, in answer to the question: "Now you were concerned about the fact that Henry Isaacs who had been chief executive of the business had died, is that correct?" Lipson answered: "I was concerned and was sorry he died. I knew him for a long time. We were good friends. I was not concerned in the sense the business was terribly injured by it, because he was a very elderly man. We all had a lot of affection for him, but we did not think it would injure the business because it was deprived of his leadership." Lipson testified further: "We liked him, and he was a dependable man, and he had a good deal of experience, and yet he was not what the business needed at that time. We knew that." He stated further that after Mr. Isaacs's death "there was no other manager they had except a man named Walsh," and that Walsh and the directors "did not agree very well."

The problem was then presented as to how new management, with assurance of stability and permanency, could be attracted. Okin recalled the suggestion of J. D. Pickett, a director, made before the death of Mr. Isaacs, of combining "ownership and management. He recognized the vulnerability of the corporate setup, and that

also in appreciation of his contribution as a director of the company
taking the initiative in doing - constant constructive work in the
no desire to give up his own practice or any part of it, and that
he first approached Mr. Isaac, who represented the "Klein-Isaac-Isaac"
holdings consisting of about 40% of the company's common stock.
There were discussions between him and the board of directors for
new management. Some of these discussions took place prior to the
death of Mr. Isaac. Isaac's death was a surprise to all who knew him
or April, 1955 and was the result of a heart attack. He was
invested in the stock, and the company, which was a private company,
action. On cross-examination by the attorney for the plaintiff, in
answer to the question: "Did you ever discuss with Mr. Isaac the
that Henry Isaac who had been a director of the company and
died, is that correct?" Isaac answered: "I am not sure, but I
sorry he died. I know him for a long time. I was good friends
I was not concerned in the matter. The business was in the hands of
by it, because he was a very friendly man. I am not sure, but I
attention for him, but we did not think it would be a good idea
because it was desired of his family. I am not sure, but I
"He liked him, and he was a dependable man, and he had a good deal
of experience, and he was not just the business manager as in
time. He knew that." He stated further that after Mr. Isaac's
death "there was no other manager that had a great deal of
and that Alan and the director did not agree very well.
The problem was then presented as to how the company could
with assurance of stability and permanency, could be maintained.
Alan recalled the suggestion of J. A. "Isaac", a director, made
before the death of Mr. Isaac, of combining "ownership" and management.
He recognized the vulnerability of the corporate form, and that

if the common stock which controlled the company fell into the hands of unscrupulous or incompetent persons, the assets would be dissipated and the business destroyed. Lipson's clients were wholly inactive in the business, except as represented by him on the board. After Lipson declined to become active in the management, Okin conceived the idea of creating a group consisting of Lawrence Klein, James Walsh, the defendant Shalowitz and himself to acquire the common stock, or at least the majority, in order to set up an efficient and stabilized management and with the thought of making Lawrence Klein the active head. Klein had previously operated a department store, but had sold out. He was experienced and competent in the management of such a business. He had at all times been the owner of a substantial block of the common as well as preferred stock, and for a number of years prior to 1935 had been a director. In 1935 he resigned as a director because of opposition to the policy advocated by Mr. Isaacs. Walsh had been general manager of the store since 1933. He owned common stock. While his services were not satisfactory to the board, Okin felt that by proper supervision and direction he could be made useful. Okin spoke to all of these parties, suggesting a combined investment in the acquisition of the common stock in order to stabilize the management and also suggested to Klein that he become an active head of the company. Klein was receptive, but would not at that time commit himself either as to the making of the investment or the acceptance of an executive position. He wanted to know what the stock could be bought for and suggested that Okin carry on negotiations to that end with Lipson. Klein felt that \$15,000 was more than the common stock was worth and that the entire block held by Lipson's clients should be acquired for that sum. Okin expressed himself as believing that the

offer should be not less than \$25,000. Walsh's position, after Okin had discussed the matter with him, was that he would make the investment if Lawrence Klein did. After negotiations covering two or three months, Lipson indicated that he could deliver the stock, other than that belonging to the incompetent estates, for \$25,000. The result of these negotiations was reported to Shalowitz, Klein and Walsh. Shalowitz was agreeable. Klein felt the price too high and preferred to sell rather than to buy. Walsh concluded not to buy any additional stock. Up to this point, which was around the middle of September, 1938, Okin did not contemplate becoming the active head of the company. The alternative was then presented to the defendants, either to permit the company to continue to drift without proper executive direction, or to assume the burden of stabilizing the management, including the hazard of a substantially greater investment than originally contemplated. Defendants' loyalty to the stockholders, as well as their faith in the company and their own ability, induced them to carry through the venture, which to them appeared the only logical and feasible method of rescuing the business. This necessitated that Okin restrict in a large part his law practice in order to give the major portion of his time to the store, in reorganizing the company's operations and establishing proper and adequate executive direction.

Fred Sadler, president of Sadler & Company, which was engaged in the securities business in Chicago, testified that, including stock owned by him, his company and its customers, he represented 14,000 shares of the preferred stock, and that he actively solicited proxies in order that he might become a director to better protect these preferred stockholders. He was elected a director at the annual meeting held in March, 1938 and has continued as such director. He testified that before he became a director he had gone through the store a good many times and "checked with some of the personnel."

After he became a director he continued his investigation. He stated further that after talking with the personnel, examining the records and statements "back four or five years" he found that the company needed reorganizing, and that "there seemed to be no active head." Participation was offered Sadler in the summer of 1938, before consummation of the purchase of the stock. Sadler testified further that he told Okin that in his opinion the common stock had no value to him as an investor; that the only value would be to someone who was interested in the actual management, and that this was because "they might be able to make their own bet good by investing money in something and working like the devil."

At the directors' meeting held on October 18, 1938, at which Lipson acted as chairman, the following directors were present: I. B. Lipson, Porter Fox, Fred Sadler, J. D. Pickett,, I. Shalowitz and Harry Okin. Jules Ladany was present as an "advisory director."

At that meeting Okin made a full and complete statement of his efforts to obtain adequate, proper and stabilized management for the company; of his approaching Klein and Walsh to join him and Shalowitz in acquiring additional stock; of his negotiations with Lipson; and of the decision of the defendants to purchase the stock. He also stated that any of the directors who cared to join in the investment would be welcome, and that he had spoken to Mrs. Isaacs and her family, explaining to them what had been done and offering them an opportunity to share in the acquisition, but that they declined. The board, as disclosed by the minutes and the testimony of the several directors, including those representing the preferred stock, showed complete approval of the course pursued by the defendants. Walsh was then elected president. The by-laws were amended and the office of chairman of the board created. Under this management the chairman of the board was made "chief executive and administrative officer of the corporation." Okin was elected to that office. Immediately upon the conclusion of the directors' meeting, the purchase of the stock owned by Lipson's

[illegible]

clients (except that belonging to a conservator of incompetent persons) was paid for and the certificates delivered to the defendants. The stock owned by Lawrence Klein was also bought at about the same time. Subsequently, the defendants purchased from the conservator the stock belonging to the estates of the incompetents and paid therefor the same price as that paid to Lipson's clients. The stock belonging to Walsh was also subsequently acquired.

After it appeared that the deal for the stock controlled by Lipson's clients would be made, Okin, around the middle of September, 1938, invited plaintiff and her sons-in-law to his office. Up to that time defendants had not informed Mrs. Isaacs or her sons-in-law of the negotiations for the purchase of the stock. In response to Okin's invitation Ladany, Metz and Mrs. Isaacs called at his office around September 15. Defendant Shalowitz was also present. At that time Okin explained in detail his negotiations for the purchase of the stock, also the financial condition of the store, the accumulations of unpaid dividends on preferred stock, the uneasiness and dissatisfaction of the stockholders and the unrest of the employees. He testified that none present dissented from the facts as stated by him. He offered to permit Mrs. Isaacs to participate in the purchase of any amount of stock short of control, but refused to allow her to acquire stock control. He advised her to think the matter over and let him know her decision. Not later than three weeks thereafter Ladany advised him that Mrs. Isaacs was not interested. Okin testified that this decision was conveyed to him around October 15, 1938.

About November 14, 1938 Ladany telephoned Shalowitz that Mrs. Isaacs had decided to buy some of the stock. An appointment at Okin's office was made shortly thereafter. At that conference plaintiff, her three sons-in-law and defendants were present. Mrs. Isaacs stated that she wanted to purchase enough stock to have control. She said she wanted to buy the stock "for the girls." Okin stated that

that was tantamount to buying it for the sons-in-law and that he was unwilling to have any association with Metz and Newman; that the purchase by Mrs. Isaacs of the control would upset all that he had done; that he and Shalowitz had made their investment; and that they would be willing to sell her part of their stock short of control. He suggested a voting trust agreement. He later prepared a draft of such agreement and sent copies to Mrs. Isaacs and her sons-in-law. This draft provided that all stock owned by Okin, Shalowitz and Mrs. Isaacs was to be voted by the three of them as trustees, the decision of two to govern. Mrs. Isaacs sent for her brother, Henry Weissenbach, to come from New York, and on November 18, 1938 a meeting was held at Okin's office with Henry Weissenbach and the three sons-in-law. Mrs. Isaacs was not present. Henry Weissenbach at one time practiced law. He protested to Okin about the terms of the voting trust. He said: "We don't want to buy on that basis." He indicated that he had been talking to a lawyer friend of his about the matter, whereupon Okin stated that he did not know that he had any controversy with Mrs. Isaacs. Okin testified that he stated that the situation made it unwise for him to continue to represent Mrs. Isaacs or the estate; and that later that day Weissenbach returned to his office and asked: "Isn't there something we can do that will retain the cordial relations that have existed so long?" Okin stated that he answered: "Henry, this is not my inviting. It has gone to the point now where I don't see what can be done. He said, well can't you give Walter Metz a job? I said, Henry, I have definitely gone on record on that and it is not my own decision; the board of directors and others that I talked to about this are of the same accord. No, that cannot be done. I am sorry." Okin stated further that he did not see Mrs. Isaacs professionally subsequent to that conversation; that on January 13, 1939 he received a telephone call from Herbert Lautmann of the law firm of Sennenschein, Berkson, Lautmann & Levinson in which he was told that they had been retained as attorneys to represent

that was tantamount to saying it for the purpose of the fact that
 was unwilling to have any association with the fact that
 the purpose of Mrs. Leland at the time would have been that
 he had done; that he and his family and his family and his
 that they would be willing to let him go and let him go and
 of control. He suggested a voting trust agreement. He said
 prepared a draft of such agreement and sent it to Mrs. Leland
 and her son-in-law, who then provided for all other things
 again, Mr. Leland and Mrs. Leland were to be named as the parties
 then as trustees, the decision was to be made by the two of them
 for her brother, Henry, to be named as the trustee. He said
 November 16, 1938 a meeting was held at Mr. Leland's office and
 Miss Leland and the three sons-in-law, Mrs. Leland was not present.
 Henry Leland was at the time. He said that he observed at the
 about the terms of the voting trust. He said that he did not
 on the basis. He indicated that he had been talking to a lawyer
 friend of his about the matter, and that he had been told that
 not know that he had any conversation with Mrs. Leland. He said
 that he stated that the situation was to be decided by the two of them
 to represent Mrs. Leland on the matter; and that he had a copy
 Leland returned to his office and asked: "Isn't that something
 we can do that will retain the control of the matter and have
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 inviting. It has gone to the point now where I don't see what can
 be done. He said, well, you'll give him a job. He said,
 Henry, I have definitely gone on record on that and it is not my
 own decision; the board of directors and others and I talked to
 about this at the time of the same record. He, that cannot be done. I
 am sorry." Mr. Leland stated further that he did not see Mrs. Leland
 professionally subsequent to that conversation; that on January 16,
 1939 he received a telephone call from Herbert Leland of the law
 firm of Sonnenbels, Peterson, Leland & Leland in which he

the Isaacs estate and Mrs. Isaacs.

Plaintiff introduced testimony controverting certain aspects of defendants' testimony. Mrs. Isaacs, Ladany and Metz, according to this testimony, protested vigorously at the September 15th meeting in Okin's office, asking him why he had "done this" and why he had, through a period of four months while he was negotiating, not informed them about it. Ladany testified that during the following days he talked to Okin and informed him that Mrs. Isaacs would not be interested in purchasing a mere minority interest. Ladany testified that in November, 1938 he told Okin he could no longer act as his counsel because if Okin treated Ladany's mother-in-law the way he had, Ladany "would have no confidence" that Okin would handle Ladany's wife any differently were he (Ladany) to pass away. Okin testified that the professional relations between Ladany and the company of which he was president, and Okin, and between plaintiff and Okin continued unaffected; that the cordial relations were apparently unimpaired; and that when the professional relations were severed, it was Okin who took the action.

The evidence shows that plaintiff wanted one of her sons-in-law on the board. Okin expressed opposition to Newman and Metz. Ladany, in Okin's judgment, was better qualified than the other two and thereafter the family agreed upon Ladany. Okin explained that the company could not elect a director without holding a special meeting of the stockholders. He advised against a special meeting of the stockholders because of the turmoil created by quest for proxies at the annual meeting held in March. He proposed that for the time being Ladany attend the board meetings as an "advisory director," with authority to participate in the deliberations, but without voting power. Ladany testified that he attended several of the board meetings and received the customary director's fees.

the Texas estate of Mrs. Jones.

Plaintiff introduced testimony concerning a check

of defendant's testimony, Mrs. Jones, during the trial.

to this testimony, plaintiff introduced a check of Mrs. Jones

in this office, asking the jury to find that it was not

through a check of Mrs. Jones which was introduced.

Plaintiff introduced a check of Mrs. Jones during the trial

and he failed to give the information that Mrs. Jones had not

be interested in the check which was introduced.

It is further stated that the check was introduced

and counsel because it was introduced in the evidence.

as had, but it was not introduced in the evidence.

Plaintiff's testimony was that the check was not introduced

testified that the check was not introduced in the evidence.

company of which he was a member, in this office, and

and this continues until the check was introduced.

Plaintiff introduced a check of Mrs. Jones during the trial

and it was found that the check was not introduced.

The evidence was that the check was not introduced

in-law on the check. The check was not introduced

and in this judgment, was introduced in the evidence.

and defendant was found guilty of the crime.

The company could not show a director without the check

meeting of the stockholders, the company could not show

of the stockholders because of the check introduced

proxies at the annual meeting held in 1928. It was found

the time being during the board meeting on the 15th

director, with authority to participate in the election, but

without voting power. Plaintiff testified that he attended

of the board meeting and received the authority director's

Plaintiff wanted the company to continue paying Mr. Isaacs's salary during the balance of the calendar year. Both Okin and Lipson were sympathetic. However, Lipson testified that after briefing the question, and in view of the condition of the company, that he had come to the conclusion that any of the directors voting for such payment would become personally liable, all of which was stated to the board. The matter was brought up at the June meeting of the directors, but no action was taken. Plaintiff wanted Metz placed in an executive position. This matter was discussed at a meeting early in June, at which plaintiff, her sons-in-law and Okin were present. Okin promptly expressed opposition to any such employment. Metz had worked at the store at one time. Okin stated that he was discharged. Metz says he resigned. Mr. Isaacs was president when Metz's employment was concluded, and he was never rehired. Where there was a controversy as to the facts, the chancellor gave credence to the testimony introduced by the defendants.

Plaintiff states that the attorney is a fiduciary standing in a relation of trust and confidence to his client; is governed by the same rules applicable to trustees and owes the client the duty of absolute fidelity and loyalty, which continues even after the termination of his employment, citing Meinhard v. Salmon, 249 N. Y. 458, and other cases. Plaintiff also asserts that where a person in a fiduciary relation to another acquires property, and the acquisition or retention of the property is in violation of his duty as fiduciary, he holds it upon a constructive trust for the other; that a trustee violates his duty to the beneficiary if he enters into substantial competition with the interest of the beneficiary, even though this involves acquisition of property to which the beneficiary did not have legal title; that an attorney or other fiduciary cannot, without the client's or fiduciary's knowledge and consent, buy and hold, otherwise than in trust for the client or

fiduciary, any interest in property which is involved in or connected with the litigation or transaction being handled on behalf of the client or fiduciary; that the burden of proof is upon the attorney or other fiduciary, where he purchases property of the client, or property which it is his duty to purchase for the client, to show that he has acted with strict fairness and equity, or, if it be the fact that no fiduciary relation existed; and that a third person who knowingly participates in a fiduciary's breach of trust is liable to the fiduciary for such action.

Defendants concede the sanctity of the fiduciary relation between lawyer and client and invite close scrutiny of the conduct of the defendants as disclosed by the credible evidence. The respective parties cite numerous cases in their briefs. We have read these cases. It is a familiar principle that in determining what is decided by a particular case, the general expressions of the court must be regarded as limited by the facts appearing in that particular case. Allen v. Woodruff, 96 Ill. 11. We are satisfied that the credible evidence and the facts and circumstances show that plaintiff did not decide to purchase any stock until November 14, 1938. Okin was a fiduciary. We agree with the defendants that the obligations and duties of a fiduciary are restricted to and limited by the employment; that they do not apply to acts disassociated therefrom; and that they do not preclude an attorney or other fiduciary from making personal investments where such investments are not within the scope of the employment or the result of the use of confidential information procured therefrom. Okin owned preferred stock in the Illinois corporation which he purchased for more than \$25,000. He had been an officer and director of both corporations since 1929. In Securities and Exchange Commission v. Chenery Corp., 318 U. S., 80, the court said (85):

fiduciary, any interest in property connected with the litigation or transaction being handled on behalf of the client or fiduciary; and the failure of such person the attorney as other fiduciary, where an otherwise property of the client, or property which it is his duty to preserve for the client, so that he has acted with strict fidelity and equity, or, if it be the fact that no fiduciary relation exists, and that a third person who knowingly participated in a fiduciary breach of trust is liable to the fiduciary for such breach. Defendants concede the authority of the United States Supreme Court in *Lawyer and Client* and invite also testimony of the conduct of the defendant as disclosed by the available evidence. The record discloses that numerous cases in this State, the Court has found these cases. It is a familiar principle that in determining what is decided by a particular case, the general application of the law must be regarded as limited by the facts presented in the particular case. *Allen v. Woodbury*, 33 Ill. 11. The defendant in the credible evidence and the facts - no reasonable person knows the plaintiff did not decide to purchase any stock until November 1928. Again was a fiduciary. He acted with the defendant that the obligations and duties of a fiduciary are restricted to what limited by the employment; that they do not extend to acts disclosed theretofore; and that they do not include an attorney or other fiduciary from making personal investments where such investments are not within the scope of the employment or the result of the use of confidential information received theretofore. Again asked for preferred stock in the Illinois corporation which he purchased for more than \$25,000. He had been an officer and director of both corporations since 1926. In *Beutelsch and Exchange Corporation v. Chenevix Tann*, 318 U.S. 60, the court said (85):

"But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"

The fact that Okin was an officer and director of the corporation did not preclude him from buying additional stock, especially, since his purchases were not from the estate. In the Securities and Exchange Commission case, the court also said: "The courts do not impose upon officers and directors of a corporation any fiduciary duty to its stockholders which precludes them from buying and selling corporate stock." See also Bawden v. Taylor, 254 Ill. 464, 467; Bisbee v. Midland Linseed Products Co., 19 Fed. (2d) 24; Young v. Bradley, 142 Fed. (2d) 658, 661; Houghteling v. Stockbridge, 136 Mich. 544. Defendants say that if any confidential information had been acquired by Okin, as attorney, which he put to improper use, a different situation might be presented. There is no evidence or contention that defendants acquired or availed themselves of any confidential information resulting from the employment of Okin as attorney. His many years of active connection with the corporations, both as an officer and attorney, supplied him with complete information respecting not only the internal setup, but all the problems confronting them. There is a discussion in the briefs as to whether the Delaware corporation was a "closed" corporation. We do not believe that it is material to decide whether or not it was a "closed" corporation. Our view is that Okin had as much right to buy the stock as plaintiff or any other stockholder. The fact that he was acting as attorney for the estate, a matter wholly dissociated from stock purchases, did not preclude him from purchasing stock. There was nothing antagonistic in his purchases to his professional relations. The fact that the financial condition of the company was very materially improved, redounded to the benefit of all stockholders, including the estate.

Defendants maintain that good faith, conscience and reasonable diligence are required of a party seeking relief in a court of equity; that the absence of any one of these elements is fatal to recovery; that a delay wholly unexplained of approximately five years before action is brought to establish a constructive trust of highly speculative securities is such laches as will, even if a case were otherwise proven, bar recovery. Plaintiff maintains that she is not barred by laches and cites Dixmoor Golf Club v. Evans, 325 Ill. 612, where the court said (622):

"Laches is such a neglect or omission to assert a right as, taken in conjunction with lapse of time and other circumstances causing prejudice to the opposite party, operates as a bar in a court of equity. (Morse v. Seibold, 147 Ill. 318.) It will only be applied where, from all the circumstances, to grant the relief to which the complainant would otherwise be entitled would presumptively be inequitable and unjust because of the delay. (Corvett v. Klehm, 157 Ill. 462.) A court of equity will be slow to apply the doctrine when there is no change in the situation of the parties to the prejudice of the defendant during the delay. (Totten v. Totten, 294 Ill. 70.) Mere delay short of the statutory period of limitation will not be laches where there are no circumstances which place the defendant in a worse position because of the delay. (Gibbons v. Hoag, 95 Ill. 45, Lynn v. Worthington, 266 Ill. 414.) Equity follows the law except when delay is accompanied by some other element rendering it inequitable. (Stowell v. Lynch, 269 Ill. 437.)"

Plaintiff urges that in the instant case the delay not only did not operate to the prejudice of the defendants, but worked out for their benefit; that no change was made in their situation because of the delay in bringing suit; that by the end of 1943 they had collected an excess compensation over and above the rate which they had formerly received, at least \$112,984.44, against the \$35,904.08 they had paid for the stock, and that the two of them for 1942 alone received an aggregate of \$52,054.39 as salary and commissions; that the compensation for 1943 was not less than that; that the figures for 1944 should be at least as good; and that the defendants have benefited handsomely by the delay in bringing the suit. The evidence shows that those approached by Okin to participate in the purchase of the stock and the directors representing the preferred stock, believed that the common stock at the time possessed no equity in the corporate

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five years before action is brought is sufficient to establish a presumption
of highly speculative conduct in such cases as this.
even in a case where otherwise proper, but recovery is denied.
maintains that the is not barred by laches and also argues that

Oliver v. Evans, 288 Ill. 619, where the court said (1924):

"Laches is such a neglected or omission to assert a right
as, taken in conjunction with lapse of time and other circumstances
relating prejudice to the party, operates as a bar to
a court of equity. (Evans v. Oliver, 288 Ill. 619, 1924.) It is not
only an implied bar, but all the circumstances, it is true, are
relief to which the complainant would be entitled would be denied
prejudicially be inestimable and unjust because of the delay.
(Oliver v. Evans, 288 Ill. 619, 1924.) It is not a rule of law
to apply the doctrine when there is no change in the situation of
the parties to the prejudice of the defendant. (Evans v. Oliver,
(Evans v. Oliver, 288 Ill. 619, 1924.) It is not a rule of law
period of limitation will not be applied where there are no circumstances
attendant which place the defendant in a worse position because of
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id. 614.) Equity follows the law except when delay is excused
by some other element rendering it inapplicable. (Oliver v. Evans,
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delay in bringing suit; that by the end of 1943 they had collected
an excess compensation over and above the rate which they had normally
received, at least \$112,984.44, and that the \$5,000.00 they had
paid for the stock, and that the two of them for 1944 alone received
an aggregate of \$33,054.76 as salary and compensation; that the
compensation for 1945 was not less than that; that the figures for
1944 should be at least as good; and that the defendants have benefited
undoubtedly by the delay in bringing the suit. The evidence shows
that those approached by Olin to participate in the purchase of the
stock and the directors representing the preferred stock, believed
that the common stock at the time possessed no equity in the corporation

assets. This is confirmed by the figures contained in the balance sheets. These exhibits show the net worth of the company on January 5, 1939 at \$780,581.86, and that subsequent to that time and until defendants took hold, the operations were being conducted at a loss. Each year thereafter a material gain was reflected so that on January 18, 1943 the net worth of the company had risen to \$1,036,399.67. This improvement, effected during the period of defendants' executive direction, gave the definite possibility of future value to the common stock. In cases of rescission of contracts for fraud, or in cases involving constructive trusts respecting property of a speculative character, diligence on the part of the party claiming to have been defrauded has always been an indispensable element in inducing action by a court of equity. One will not be permitted to remain passive over a period of years and then assert his claim after the property has increased in value. In LeGout v. LeVieux, 338 Ill. 45, the court said (51):

"When a court of equity is asked to lend its aid in the enforcement of a demand that has become stale there must be some cogent and weighty reasons presented why it has been permitted to become so. Good faith, conscience and reasonable diligence of the party seeking its relief are the elements that call a court of equity into activity, (McDearmon v. Burnham, 158 Ill. 55; Castner v. Walrod, 83 id. 171; Carpenter v. Carpenter, 70 id. 457;) and the absence of any one of these elements is fatal to recovery." * * * Appellant, with full knowledge of the facts, having allowed any rights which he might have had to lie dormant, as shown by the evidence in the case, the court was fully justified in dismissing the cross-bill."

See also Spies v. DeMayo, 396 Ill. 255, 272.

Plaintiff admits that she was fully informed of defendants' intention to purchase the stock in September, 1938 and of its consummation in October, 1938. The breaking of the professional relations occurred around December 1, 1938. New attorneys were retained, of which defendants were advised in January, 1939. The complaint was filed on October 5, 1943. No evidence whatsoever was offered to explain or excuse the delay. The subject matter of the controversy was securities of an exceedingly hazardous and speculative

character. She had the advice of competent and reputable counsel and of her sons-in-law, one of whom was an experienced businessman, and another a counsellor and trader in a stock brokerage firm. As part of his duties, he advised in the purchase and sale of securities. He was familiar with the stock setup of the corporations involved in the instant case. Defendant Okin had a right to assume from the legal inferences attributable to the long delay, an approval and affirmance of his acts, and was thereby encouraged to devote his time to his executive duties in connection with the company's operations, which necessitated that he forego and give up, in a large part, his legal practice. With respect to plaintiff's reference to salaries and commissions received by the defendants since they purchased the stock, defendants suggest that if plaintiff, instead of waiting five years to file her complaint, had deferred that action for ten or fifteen years, the aggregate of the compensation paid to them would have made, according to plaintiff's conception, an even more impressive amount. Plaintiff's complaint contains no allegation of fraud or mismanagement, or that defendants' compensation was excessive, and there is nothing in the record indicating that the amounts received by them were not fully earned. Defendants call attention to the fact that the services of Walsh, who was general manager from 1933 and president from 1938, were terminated in the early part of 1940 and that his duties devolved on defendants, and that there is no evidence that the salaries of the executives after the death of Mr. Isaacs exceeded those paid prior thereto. The salaries paid to officers of a corporation have no reference to the amount of stock owned by them. The salaries are paid solely on the value of the services and without regard to the fact that stock is or is not owned by the recipient. We find that the long delay in bringing plaintiff's action is a bar to any relief under the doctrine of laches.

Plaintiff urges that the trial court admitted incompetent evidence offered by the defendants and excluded competent evidence offered by her. Under this heading she complains that the chancellor admitted reports and balance sheets showing the financial condition of the Illinois corporation in 1938 and in the years following down to 1943; that the chancellor erred in admitting "much evidence tending to show Okin's very wide business interests in a large number of corporations"; and that the chancellor erred in admitting conversations between Okin and Herbert Lautmann, who was substituted for Okin as plaintiff's attorney. We are of the opinion that all of this evidence was competent and material. Plaintiff does not point out any competent evidence offered by her and excluded by the chancellor.

Plaintiff maintains that the decree is contrary to the evidence and the law. In our discussion of the other points argued by the parties we found that the decree is supported by the law and the evidence. Therefore, the decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.

43871

WILLIAM FRANCE,

Appellee,

v.

CITIZENS CASUALTY COMPANY OF
NEW YORK, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

3311A. 238

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover payment, from an insurer, of a tort judgment plaintiff had previously obtained against the insured. Verdict and judgment were for plaintiff and the defendant insurer has appealed.

Plaintiff was injured July 18, 1944, by a truck driven by Luther Young. At the time Young was insured by defendant against loss through liability arising out of such an accident. Plaintiff sued Young who called upon defendant to defend him in the action. Defendant refused. The trial resulted in a judgment for plaintiff for \$5,000 and costs.

Under the policy defendant agreed to pay any final judgments up to \$5,000.00 for bodily injuries to one person resulting from the operation of the vehicle covered by the policy. Plaintiff demanded payment of the judgment. Defendant refused to pay and the instant action followed.

Plaintiff alleged the accident and recovery of the unpaid final judgment; the operation of the truck causing the injury; the issuance by defendant to Young of Policy No. 69443, in force and effect the day of the accident, covering the truck; and his demand and defendant's refusal to pay the judgment. Defendant denied issuing the policy or its force and effect at the time of the accident and denied insuring the truck involved in the accident.

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The defense contained in the last clause is the nub of the case. It is conceded that the policy issued to Young covered a 1932 Reo truck and that that truck was the one which struck plaintiff. The defense was that after the original policy issued, but before the accident, the 1932 Reo truck was eliminated and a 1934 Reo truck substituted for coverage under the policy.

The ultimate question in this case is whether, at the time of the accident, the policy covered the operation of the 1932 Reo truck. In this are involved the questions whether transfer of the coverage was made before the accident and whether it was made so as to bind Young and affect plaintiff's recovery against defendant.

Young was engaged in a local trucking business. In February 1944, he sought to have the 1932 Reo truck tested for safety, as required by law. During the test he was advised that his truck could not be certified until he had procured insurance as required under Section 16 of the Illinois Truck Act, (Ill. Rev. Stats.) Chap. 95 $\frac{1}{2}$, Pars. 253. A Safety Lane attendant referred Young to one Abrahamson for the required insurance. Young went to Abrahamson's office on February 26. He ordered a policy which was later issued by defendant as No. 69443 and delivered to Abrahamson. This policy was dated March 7, 1944, countersigned by Kurt Hitke & Co., Inc., defendant's "Authorized Chicago Representative", covering the operation of the 1932 truck for one year from February 26, 1944.

The relationship of Abrahamson to plaintiff and defendant is important. The evidence shows that April 10, 1944, Abrahamson wrote Kurt Hitke & Co., requesting transfer of the coverage from the 1932 Reo truck to a 1934 Reo truck. An endorsement making the transfer was issued by defendant pursuant to the request. If Abrahamson was acting as Young's agent in bringing about the transfer of the coverage, the 1932 truck was not covered at the

time of the accident. On the other hand, if Abrahamson was acting as agent for the defendant or without authority of Young, unless Young ratified the unauthorized conduct, the endorsement would not be effective to preclude plaintiff's recovery.

An agent is defined in the insurance act as any person, etc. who solicits, etc. on behalf of any company, contracts of insurance of the kinds enumerated in the Insurance Act. Ill. Rev. Stats. Chap. 73, Par. 588. A broker is defined in the Act as any person, etc. who, for commission, etc. acts or aids in any manner in solicitation or negotiation on behalf of an assured, contracts of insurance of the kind enumerated. Licenses are required for agents and brokers under paragraph 590 of the Act. The applications for licenses differ. Pars. 592, 598. A broker may, in a given case, be an agent either of the insurer or the insured. He may under certain circumstances act for both. The terms of his employment or the duties he performs rather than his title determine his relationship.

When Young went to Abrahamson's office to get the insurance he asked for Abrahamson, but "the fellow at the desk said he would take the order." Young did business with this man from then on. He and Abrahamson never met. Young took out the insurance and made monthly payments. The policy was delivered when he had made all the payments, sometime after the accident. We think that the circumstances we have related under which Young procured the insurance, plus the uncontradicted testimony of Abrahamson, established that in the beginning Abrahamson was the agent of Young. Abrahamson testified that he solicited business and wrote insurance for anyone who wanted it and that in 1944 he wrote insurance with about 15 companies, including defendant; that he had no authority to sign its name to a policy and did not issue policies; and that he was not

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under its offer. In addition to the foregoing offer, Hoffman made a further offer agreeing to pay for the same assets, property and rights which the Doubleby Company had offered to purchase, the sum of \$225,000, upon the following conditions:

"(a) I am to be permitted to appear before the directors of your corporation, at a meeting to be held by them to consider the matter of sale of the said estates, property and rights, on such reasonable notice in writing as you may prescribe, and after such sale has been approved by the shareholders of your said corporation; (b) at such directors' meeting, or any adjournment thereof, I am to be accorded the right to increase my bid of \$225,000; (c) the said estates, property and rights are to be sold to the highest cash bidder whose bid is made at any such directors' meeting; (d) no right is to be given by one bidder, to make further bids after the closing of that said directors' meeting, unless all bidders are given the right to make further competitive bids." With this deposit of \$50,000, and on the following day made \$175,000 to bring his total deposit up to \$225,000. At that meeting the terms of the submission of the said estates, property and rights were resolved.

obliged to send business to any particular company. We think the following cases support our conclusion on this point. Lycoming Fire Ins. Co. v. Rubin, 79 Ill. 402; McKinney, et al v. The City of Alton, 41 Ill. App. 508; Middle Western Telephone Co. v. U. S. Fire Insurance Co., 296 Ill. App. 260; Tri-City Transportation Co., et al v. Bituminous Casualty Co., 311 Ill. App. 610; 44 C. J. S. pp. 779, 780.

There was no refutation of the testimony with respect to issuance of the endorsement. There were no questions of fact for the jury with respect to it or Abrahamson's original agency. We turn now to the question whether Abrahamson, when requesting the endorsement, was Young's agent.

Young purchased a 1934 Reo, one and a half ton truck about March 7, 1934, when the 1932 truck was in a state of disrepair. He thereupon went to Abrahamson's office where he said he asked whether he could use the 1934 truck for a few days. He testified that he was told he could use the truck; that he did not ask for a change in the policy and never received the endorsement; that he was asked whether he wanted insurance on the 1934 truck and said he did not; that he was asked to produce the papers covering the sale of the 1934 truck so that Abrahamson's office could get a description and the motor and serial numbers; that he had applied for a license on the 1934 truck and knew that insurance was required for its operation; that he did not want Abrahamson to insure it, since he could get cheaper rates elsewhere and that he told Abrahamson's office that; and that he never got insurance and never applied for any for the 1934 truck. Young further testified that following the accident in which plaintiff was injured, he filled out a report which stated the 1932 truck was involved; that at Abrahamson's office he was told to tear that report up because the coverage had been transferred to the 1934 truck; and that he there-

after signed three separate reports which stated that the 1934 truck was the one involved. Taking this testimony to be true, we must hold as a matter of law that Young ratified the transfer of the coverage. He should not be heard to deny the authority of Abrahamson under the circumstances. Walsh v. Tadlock, 104 Fed. (2) 131. This obviates the necessity of considering the question whether Young requested Abrahamson's office to make the transfer of the coverage. The fact that the endorsement making the transfer did not reach Young until after the accident, is not important since we have held that Abrahamson was his agent.

Having shown that the issues involved became questions of law, we believe the court should have directed a verdict for defendant at the close of the evidence. This conclusion disposes of points made by plaintiff, based on the preponderance of evidence, burden of proof, etc. It also disposes of points made here, but not at the trial, respecting automatic coverage of the policy. These points were argued to illustrate the lack of reason for Young to have requested a change.

We think that questions concerning the purpose of insurance under the Illinois Truck Act are not pertinent in view of our conclusion that there was no insurance covering the 1932 truck when the accident occurred.

It is unnecessary for us to consider any other points raised. For the reasons given the judgment is reversed.

REVERSED.

LEWE, P.J. AND BURKE, J. CONCUR.

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43928

THE PEOPLE OF THE STATE OF ILLINOIS,)

Defendant in Error,)

v.)

WILLIAM ODELL,)

Plaintiff in Error.)

189
A
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

331 I.A. 239

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Writ of error issued from this court to review a judgment, upon a verdict of guilty, sentencing defendant to the County Jail for thirty (30) days for assault with a deadly weapon.

The information filed by David Cheshire, April 10, 1946, charged defendant with assault upon Cheshire using a 38 calibre revolver with intent to inflict great bodily harm upon him without any considerable provocation appearing, and being at the time possessed of a malicious and malignant heart. The verdict followed the charge in the information.

Testimony for the State was that Mrs. Cheshire was a waitress and defendant a chef, at Green's Restaurant at the northwest corner of 94th Street and Ashland Avenue; that previous to April 5, defendant had annoyed Mrs. Cheshire, who reported the annoyance to her husband David Cheshire; that on April 5, 1946, Cheshire and his father drove to the restaurant, saw his wife and informed her he would park in a parking lot across from the restaurant on the south side of 94th Street; that in the same lot defendant, that night, sat in his parked car from about 8:10 P.M. to 8:40 P.M.; that Mrs. Cheshire then emerged from the restaurant and walked east on the north side of 94th Street; that defendant started his car and followed her; that Cheshire started his car and followed defendant;

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that Mrs. Cheshire walked east across Ashland Avenue and north on the east side of Ashland Avenue; that defendant's car drove alongside of her and defendant opened the door of his car and sought to induce her to enter; that Cheshire drove in front of defendant's car, blocking its further passage; that both cars stopped and Cheshire and his father got out of their car and walked back to defendant's car; that Cheshire talked to defendant about his behavior toward Mrs. Cheshire; and that he then put Mrs. Cheshire into the Cheshire car and returned to defendant's car.

Cheshire testified that meanwhile defendant got out of his car, took something from the floor and as Cheshire started to return to defendant's car, the latter stood holding a gun and, as Cheshire approached, defendant got back into his car, leaned out the window and pointing the gun at Cheshire said, "Get away from this car if you know what is good for you", and that later when both cars left the scene, defendant rolled the window down and said that he would "bump me off." Mrs. Cheshire did not see what transpired after she was placed in the Cheshire car. She said she saw defendant get out of, and get back into, his car and later heard him say he would "bump off" her husband. Cheshire's father said he saw the gun in defendant's hand and heard him threaten Cheshire then, and later as they drove away. Another witness said she saw defendant get out of his car and reach back and take an object from the floor. A police officer testified that defendant told him that he had a gun the night of the incident.

Defendant testified that it was raining the night of April 5th; that he left the restaurant about 8:45 P.M.; that the other car drove in front of him and stopped and that he did not know either of the men who got out of it and came toward his car; that the old man came first, saying the other man wanted to see him; that the other man carried a blackjack and jumped on defendant's car, trying to open the door, saying: "Get out, I want to see you."; that

defendant told him to get away from the door and drove away; that as he drove away defendant saw Mrs. Cheshire in the back seat of their car; that he held no gun, pointed no gun, and had no gun at the time; that he made no threats and never got out of his car; that the doors of his car were locked because he "figured they were going to try to hold me up"; and that he had loaned Mrs. Cheshire \$25 on April 2nd for an emergency, due to her failure to work during the preceding two weeks. He denied making the admission to the police officer. Cheshire in rebuttal denied having a blackjack at the time. His testimony was that he carried his gloves in his hand. In this his wife corroborated his testimony.

Defendant argues that the case against him was not proved beyond a reasonable doubt; that it was not proved that an assault was committed, but that if it were, the evidence of Cheshire's approach carrying a blackjack, after having forcibly arrested defendant's progress, justified defendant's conduct of which the State offered testimony; and that the conviction cannot be upheld because one State's witness gave testimony of probable guilt, while two others gave testimony of probable innocence. He insists the verdict was the result of passion and prejudice.

We see no merit in the contention that contradiction in the State's case precluded defendant's conviction. The case of Jackson v. State, 158 Pac. 202, relied on by defendant, on this point, is far different on the facts than the case before us. It is reasonable to believe that Mrs. Cheshire did not see the gun, although her husband and father-in-law did.

There was evidence that defendant had, and pointed the gun; of threats of great bodily harm; and evidence from which a reasonable inference could be drawn that there was not considerable provocation, or that defendant had a malicious intent. These questions, therefore, were for the jury. It is apparent the jury believed the State's

witnesses and did not believe defendant. The question of credibility is for the jury and, unless the proof leaves a reasonable doubt as to defendant's guilt, we should not disturb the verdict. People v. Franklin, 390 Ill. 108; People v. Price, 371 Ill. 137.

The question whether there was an assault with a deadly weapon, as a matter of law, must be considered. The Criminal Code defines the offense as assault with a deadly weapon, etc., with intent to inflict upon the person of another a bodily injury where no considerable provocation appears or where the circumstances show an abandoned or malignant heart, Chap. 38, Par. 60, Ill. Rev. Stats.; People v. Stoyan, 280 Ill. 300. Assault is defined as an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another. Chap. 38, Par. 55, Ill. Rev. Stats.; and People v. Martishuis, 361 Ill. 178. An indictment which charges defendant was armed with a pistol, charges that he was armed with a deadly weapon. People v. Dwyer, 324 Ill. 363. There was no testimony that the revolver was loaded. This court has held that proof that a defendant said, "Get out of here you _____ or I will blow your brains out", justified the conclusion that the revolver involved was loaded. People v. Lillington, 204 Ill. App. 273. Under the testimony of the State's witnesses we think the question whether there was an assault with a deadly weapon was for the jury. People v. Reynolds, 322 Ill. App. 300.

We have read all of the cases cited by the defendant. After a consideration of this record we entertain no reasonable doubt of the defendant's guilt of the crime with which he was charged. We cannot say the verdict was the result of passion and prejudice.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

The first part of the report deals with the general situation of the country and the progress of the work during the year. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and the plans for the future.

The second part of the report contains a list of the various projects and the results achieved. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and the plans for the future.

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The sixth part of the report contains a list of the various projects and the results achieved. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and the plans for the future.

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The ninth part of the report contains a list of the various projects and the results achieved. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and the plans for the future.

The tenth part of the report contains a list of the various projects and the results achieved. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and the plans for the future.

33-1A-04

Agenda No. 5

George F. Halfacre, filed his petition alleging that he held a Limited State Elementary School Certificate issued by the Marion County Superintendent of Schools, and that on July 3, 1946, he made application to the defendants, the Board of Education of School District No. 167, Donoho Prairie School, Marion County, Illinois, Amy E. Green, Secretary of Board, George Simmons and Pavey Hawkins, President of Board; that the application was accepted for consideration; that it was the duty of the Board of Education to appoint all teachers; that it was the further duty of such Board of Education to appoint teachers holding

a valid certificate where such teacher was available; that the petitioner was the only applicant for the position of teacher at defendant's school for the year 1946-47, holding a valid teachers certificate; that the defendants refused to appoint petitioner to said position and failed to give him the reason therefor; that petitioner was damaged to the sum of \$1200, by reason thereof. The petition prayed for a Writ of Mandamus, commanding the defendants to appoint him as teacher in their school for the year 1946-47, at the usual salary of \$150. per month, for a term of eight months and for other and further relief as may be deemed proper.

Defendants filed a motion to strike the petition on the grounds that the petition was insufficient in law, because the petition showed on its face that defendants were not under a legal duty to perform the act sought to be coerced and that petitioner had no clear legal right to have performed the act sought to be coerced, and that the act sought to be coerced was in the discretion of defendants.

The Trial Court entered an order allowing the motion to strike the petition and dismissing the suit.

No person has a right to demand that he or she shall be employed as teacher, and the School Board has the absolute right to decline to employ any applicant for any reason whatever. The School Board is at liberty to contract with whom soever it chooses. (Anderson v. Board of Education, 390 Ill. 412; The People v. City of Chicago, 278 Ill. 318; People v. Bradley, 382 Ill. 383.)

The burden is on the one seeking a Writ of Mandamus, to show that he has a clear legal right to the Writ and the Writ will not issue to compel a public official to do the

thing which the petitioner seeks to have done, unless, the person seeking the Writ shows a clear legal duty on the party against whom the Writ is sought. (People v. Schlaeger, 391 Ill. 314; Bengson v. City of Kewanee, 380 Ill. 244.)

It is petitioner's contention that because he was the only applicant for the position from the district holding a valid certificate, that under the present School Code, effective May 1, 1945, and amendments effective January 1, 1946, "the Board had no right to reject his application without a showing of some character or kind for its reason in doing so." Nothing in the statute has been called to our attention regarding this, nor do we find anything in the statute taking away the right of the Board of Education to employ or not to employ an applicant for a position as a teacher.

The order of the Trial Court allowing the motion to strike the petition and dismissing the suit is hereby affirmed.

JUDGMENT AFFIRMED.

Judges Culbertson and Smith concur.

NOT TO BE PUBLISHED IN FULL.

FILED
A R 23 1947
Stanley R. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
FEBRUARY TERM,
A. D. 1947

Term No. 47F10

THE PEOPLE OF THE STATE OF ILLINOIS,)
Defendant in Error,) Error to the
-vs-) County Court of
WILLIAM BROGAN, et al.,) Saline County.
Plaintiffs in Error.)

SMITH, J.

This cause is an appeal from the County Court of Saline County, where an action was brought under paragraph 190, of Chapter 23, of Illinois Revised Statutes, 1945, to declare the defendants, Linda Lou Brogan, age two years, Randall Brogan, age four years, Robert Brogan, age six years, Raymond Brogan, age nine years, Nina Brogan, age thirteen years, Betty Ann Brogan, age fourteen years, and Mary Brogan, age fifteen years, the children of the defendant, William Brogan, neglected children. The cause was heard by a jury and a verdict was returned which found the children neglected and that the defendant, William Brogan, was unfit to care for them and that it was for the interests of the children and the State that said children be taken from the custody of their father. A motion for a new trial was filed by the defendants in which it was alleged that the verdict was against the weight of the evidence; that the

court refused to admit proper evidence offered by the defense and admitted improper evidence offered by the State; that the sheriff, who selected the jury, had signed the petition in said cause and that the court improperly refused to grant a change of venue. The court overruled both the motion for a new trial and a subsequent motion in arrest of judgment. Judgment was entered upon the verdict and the children were placed in various institutions and foster homes.

This appeal is brought because of the errors alleged in the motions for a new trial and in arrest of judgment. There are other errors alleged in these motions but they are not urged on this appeal.

One of the errors urged is that the trial court should have granted a change of venue. The record shows that no application for a change of venue was filed by the defense until the day the cause was called for trial and that no notice was given to the State's Attorney of the application for a change of venue as required by paragraph 23, Chapter 146, Illinois Revised Statutes, 1945. In the case of *People v. Barney*, 217 Ill. App. 325, the court said at page 325, "A question is raised concerning the action of the court in refusing to grant the change of venue, and it is contended that it was error to refuse to grant it. The right to a change of venue is provided by the statute, under certain conditions. It being a statutory matter, the party insisting on the change of venue must bring himself within the statutory requirements. (*Hutson v. Wood*, 263 Ill. 376.) One of the requirements of the statute is that reasonable notice be given to the State's Attorney of the application for change of venue. What is reasonable notice is left

to the discretion of the judge to whom the application is made in the particular case, and the exercise of this discretion will not be interfered with unless it is abused. (Glos v. Garrett, 219 Ill. 208.) In this case, however, the record does not disclose that any notice at all was given the State's Attorney of the application, which of itself was sufficient legal ground for a denial of the change of venue." The case at bar is identical to Barney case. The trial court properly denied the application for a change of venue as no notice was given to the State's Attorney as required by the statute. (People v. Meyering, 352 Ill. 436.)

The record shows that the sheriff, who summoned the jury, had signed the petition filed in the cause. This, and the fact that the jury was not drawn, but selected on a venire issued to the sheriff, is urged as error by the defense. However, there was no challenge to the array and there is nothing in the record which indicated that the provisions of the statute were not followed; that the sheriff improperly served the venire or that the rights of the defendants were prejudiced by his selection of the jury. The selection of a jury by a venire issued to the sheriff is a common practice in County Courts.

The principal ground for reversal urged by the plaintiffs in error is that the trial court refused proper evidence offered by them and permitted improper evidence to be presented by the State and that the verdict of the jury was against the weight of the evidence. The record shows that the defendant, William Brogan, resided in a respectable neighborhood in Harrisburg, Illinois; that his wife died about nineteen months prior to the filing of the petition

herein and left ten children surviving; that the defendants, Linda Lou Brogan, Randall Brogan, Robert Brogan, Raymond Brogan, Nina Brogan, Betty Ann Brogan and Mary Brogan, resided in the home with the father and also an older son, Roy Brogan, who was not made a party to this action. Two older daughters of the mother by another father resided outside of the home. Evidence was admitted, over the objection of the defendants, which showed that the mother had died of uremic poisoning before child birth and that one of the step-daughters had arranged for her mother to go to a hospital but the defendant, William Brogan, refused to allow her to go. This step-daughter also testified that she left her step-father's home four years prior to her mother's death because he wanted to have sexual intercourse with her. This evidence was quite remote to the time of the filing of the petition but it was admitted by the trial court on the theory that the jury was entitled to know how the defendant, William Brogan, conducted himself toward his family. In a proceeding involving the custody of children a greater latitude must be allowed in the admission of evidence than in a criminal case and the admission of this evidence by the trial court is not considered reversible error.

The evidence further showed that there had been a great deal of truancy on the part of one of the children; that some of the children were undernourished; that they frequently attended school dirty and inadequately clothed; that they appeared to have little parental care; that the purchases of food and preparation of meals in the home had been haphazard and that the defendant, William Brogan, had not been cooperative with school and public health officials. The evidence also showed that the defendant, Betty Ann Brogan,

age 14 years, had slept with her father following her mother's death and that she had made statements to the State's Attorney and a representative of child welfare, which were admitted in evidence, in which she stated that her father had made sexual advances toward her. The defendant, Betty Ann Brogan, when called as a witness by the State, said that the statements which she had signed were not true.

The evidence offered in behalf of the defendants showed that the father, William Brogan, had made an effort to keep the family together, as his wife had requested, but it failed to show that the children had been properly cared for.

There is ample evidence in the record to support the finding of the jury that the children were neglected children. They were undernourished, frequently improperly clothed and were permitted to attend school, dirty and unkempt. There was some evidence of immoral conduct on the part of the father and while this evidence was denied by Betty Ann Brogan at the hearing, the father admitted sleeping with the child.

The plaintiffs in error place much reliance upon the case of Lindsay v. Lindsay, 257 Ill. 328, where the court said, "The purpose of this statute is to extend a protecting hand to unfortunate boys and girls who, by reason of their own conduct, evil tendencies or improper environment, have proven that the best interests of society, the welfare of the State and their own good demand that the guardianship of the State be substituted for that of natural parents. To accomplish that purpose the statute should be given a broad and liberal construction, but it should not be held to extend to cases where there is merely a difference of opinion as to the best course to pursue in rearing a

child. There should be evidence of neglect, abandonment, incapacity or cruelty on the part of the parent or that the child is being exposed to immorality and vice. The right of parents to the society of their offspring is inherent, and courts should not violate that right upon slight pretext nor unless it is clearly for the best interests of the child to do so." The court refused to declare the child a ward of the State in this case because there was no evidence of dependency or neglect and merely evidence of the mother following a particular religious cult. However, in the case at bar there is much evidence of actual neglect upon the part of the parent and it was for the best interests of society, the welfare of the State and the good of the children that the guardianship of the State be substituted for that of the father, William Brogan.

We do not consider the finding of the jury against the weight of the evidence. The court properly overruled the motions for a new trial and in arrest of judgment and the judgment of the trial court is affirmed.

AFFIRMED.

Culbertson, P. J. Conkurs
Bartley, J. Conkurs.

PUBLISH IN ABSTRACT ONLY.

FILED
A R 28 1947
Stanley B. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

2102A

February Term, A.D. 1947

Term no. 47F4

Agenda 20

RICHARD DONINI,
Plaintiff-Appellant,
-vs-
FELICE DONINI,
Defendant-Appellee.

3374-051

CULBERTSON, P. J.

This is an appeal by appellant, RICHARD DONINI, (hereinafter called plaintiff), from a decree of the Circuit Court of Madison County, Illinois, by the terms of which appellee, FELICE DONINI, (hereinafter called defendant), was awarded a decree for divorce on her Counter-claim, her alimony fixed in gross and an allowance made her for her attorney fees. This litigation was instituted by plaintiff filing suit against defendant for divorce, whereupon defendant answered, denying the charges and filed a counter-claim wherein she charged the plaintiff, among other things, with extreme and repeated cruelty. Plaintiff filed an answer, denying the charges made in the Counter-claim. Plaintiff dismissed his complaint and the cause came on for hearing before the Court without the intervention of a jury on the Counter-claim and the answer thereto. Defendant was awarded a decree for divorce on her counter-claim on the grounds of

extreme and repeated cruelty.

The action of the Court in awarding defendant a decree for divorce is not challenged on this appeal; in fact, it is conceded that the evidence was adequate to support the decree. Plaintiff contends the Court committed reversible error by allowing defendant \$5,000.00 in full payment of her alimony and the further award to her of \$500.00 for her reasonable attorney fee.

It appears from the evidence plaintiff and defendant were married on July 1, 1922, and cohabited as husband and wife until March 7, 1946. There are two children of the marriage, a son and a daughter, both grown and of age. For the last seven years plaintiff has operated a tavern in Collinsville, Illinois. Plaintiff declined to estimate the value of his stock or fixtures but did testify that in the year preceding the trial he made about \$1,000.00 out of his tavern business. He denied having a \$10,000.00 savings account in the First National Bank of Collinsville, but it was clearly proven he opened a savings account in his individual name in that bank in the amount of \$10,000.00 on January 31, 1946 and withdrew the entire account on June 26, 1946, and when confronted with this proof he admitted the falsity of his former testimony and testified "that this money is all gone, that after withdrawing it he went to the race track and lost it." It is undisputed in the record defendant had always been a dutiful and affectionate wife and taken care of their home. Plaintiff was heavily indebted when they were married and defendant supported the family during the depression when her husband was not working. After the purchase of the tavern she worked therein, serving meals and tending bar by herself. Defendant was unable

to tell her husband's income but it was her opinion it was greatly in excess of the amount testified to by him. Defendant fixed the value of the tavern business at \$5,000.00. Plaintiff concedes owning the tavern business, a truck worth \$350.00, and a small amount of bonds, and the Court may well have concluded, \$10,000.00 derived from the savings account. In this state of the proof, we are called upon to decide whether or not the awarding of the amounts constituted such an abuse of discretion on the part of the Chancellor who heard this cause as to warrant a reversal.

Allowance of alimony in gross is clearly within the scope of the Court's authority, and the amount to be allowed and whether in money or in property, real or personal, are matters largely within the discretion of the Chancellor, subject to correction only when such discretion is improperly exercised. (ILLINOIS REVISED STATUTES, Chap. 40, Sec. 18) DOYLE V. DOYLE 268 Ill. 56.

Where the evidence clearly discloses property has been accumulated by joint efforts of husband and wife, it is proper to award a sum of money in gross as alimony on the theory that equity and justice demand that the wife share in the estate of the husband so acquired. In such cases, the amount of alimony is determined not merely by the necessities of the wife, but also by the equities of the case. MARTIN V. MARTIN 195 Ill. App. 32.

The solicitor's fees allowed in this case were fixed after a hearing and at which hearing the party now complaining of the amount thereof offered no evidence on the subject. Allowance of solicitor's fees in a divorce proceeding is largely within the discretion of the trial court, and unless this discretion is very clearly shown to have been

abused, its exercise will not be interfered with by an Appellate Court. BYERLY V. BYERLY 363 Ill. 517.

A careful examination of the evidence in this case does not disclose to us any abuse of discretion on the part of the Chancellor who heard this cause; either in the allowance of the alimony in gross or in the solicitor's fees, and we would in our opinion be wholly unwarranted in disturbing this decree.

The decree of the Circuit Court of Madison County, Illinois, being correct, the same is accordingly affirmed

DECREE AFFIRMED.

Justices Bartley and Smith Concur.

ABSTRACT.

FILED
In 3 1917
E. J. J.
CLERK OF CIRCUIT COURT
FEBRUARY 21 1917

44040

SAMUEL HANDLER,
Appellee,
v.
SAM J. ALPERT,
Appellant.

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}
} Appeal from Municipal Court
} of Chicago.
}
}

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in forcible detainer against defendant, to recover possession of an apartment occupied by the defendant under a lease dated February 1, 1944, between Aermotor Company, lessor, and defendant as lessee, for a term commencing May 1, 1944, and ending April 30, 1946. Upon a trial without a jury the court entered judgment for possession in favor of plaintiff, from which defendant appeals.

On September 9, 1944, the Aermotor Company sold the building in which this apartment was located, and the title was conveyed by deed in trust to the Liberty National Bank of Chicago, as trustee, pursuant to the provisions of a certain trust agreement dated September 8, 1944, which trust agreement named the plaintiff as sole beneficiary. The trust agreement provided, inter alia: " * * * that the interest of any beneficiary hereunder shall consist solely of a power of direction to deal with the title to said property and to manage and control said property as hereinafter provided, and the right to receive the proceeds from rentals and from mortgages, sales or other disposition of said premises, and that such right in the avails of said property shall be deemed to be personal property, * * * and that no beneficiary now has, and that no beneficiary hereunder

2.

at any time shall have any right, title or interest in or to any portion of said real estate as such, either legal or equitable, but only an interest in the earnings, avails and proceeds as aforesaid". It also provided for authority to the beneficiary to collect the rents.

The tenant occupied the premises beyond the expiration of the term. On June 25, 1946, plaintiff wrote to defendant, informing him that his occupancy from May 1, 1946, would be on a month to month basis, and on June 25, 1946, advised him that his tenancy was terminated as of August 4, 1946, and demanded possession on that day.

Several grounds for reversal of the judgment are urged by the defendant, but we shall consider only one, which we deem decisive of the case. It is urged by the defendant that the plaintiff has no right to maintain the action since he is only a beneficiary under the trust agreement referred to. The title, equitable and legal, being in the Liberty National Bank, they, and they alone, had the right of action in forcible detainer at the time this suit was brought. We agree with the defendant in this contention, since the terms of this ^{trust} agreement are substantially like those involved in Liberty National Bank v. Kosterlitz, 329 Ill. App. 244, wherein it was held that the right of action under such circumstances was in the trustee and not the beneficiary. The same doctrine was applied in Barnett v. Levy, No. 43987, decided by this court on April 21, 1947.

It is contended by the plaintiff that this defendant is estopped to question the title of his landlord in an action in forcible detainer. While this principle generally holds true, it does not apply in the instant case where, in the

3.

interim, the original landlord parted with the title. In Beach v. Boettcher, 323 Ill. App. 79, many authorities on this question are reviewed and this court held against the position taken by plaintiff.

Plaintiff also argues that since defendant attorned to the plaintiff, as evidenced by the several payments of rent to him, for that reason he cannot now question the right of the plaintiff to maintain this action. We do not regard the instant case as an attornment as defined by the authorities cited by plaintiff, since the trust agreement merely gave plaintiff as beneficiary the right to collect the rents but did not constitute him a landlord nor vest him with any claim of ownership, legal or equitable, in the real estate.

For the reasons indicated, the judgment of the Municipal Court is reversed and the cause remanded with directions to enter a judgment for defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Niemeyer, J. concur.

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Lichtenthal and Whistler (1973). The total chlorophyll content was determined by the method of Arar and Cook (1980). The carotenoid content was determined by the method of Lichtenthal and Whistler (1973). The total carotenoid content was determined by the method of Arar and Cook (1980). The total protein content was determined by the method of Lowry et al. (1951). The total lipid content was determined by the method of Bligh and Dyer (1959). The total carbohydrate content was determined by the method of Dubois and Gilles (1950). The total nucleic acid content was determined by the method of Burton (1956). The total ash content was determined by the method of AOAC (1990). The total moisture content was determined by the method of AOAC (1990). The total dry matter content was determined by the method of AOAC (1990). The total organic acid content was determined by the method of AOAC (1990). The total alkaloid content was determined by the method of AOAC (1990). The total saponin content was determined by the method of AOAC (1990). The total tannin content was determined by the method of AOAC (1990). The total flavonoid content was determined by the method of AOAC (1990). The total phenol content was determined by the method of AOAC (1990). The total terpenoid content was determined by the method of AOAC (1990). The total steroid content was determined by the method of AOAC (1990). The total glycoside content was determined by the method of AOAC (1990). The total alkaloid content was determined by the method of AOAC (1990). The total saponin content was determined by the method of AOAC (1990). The total tannin content was determined by the method of AOAC (1990). The total flavonoid content was determined by the method of AOAC (1990). The total phenol content was determined by the method of AOAC (1990). The total terpenoid content was determined by the method of AOAC (1990). The total steroid content was determined by the method of AOAC (1990). The total glycoside content was determined by the method of AOAC (1990).

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43905

2611 S. HALSTED ST. BLDG. CORP.,
a corporation,
Cross-Claimant, Appellant,

v.

WESTERN CASUALTY AND SURETY
COMPANY, a corporation,
Cross-Defendant, Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

331 1A 406

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

The cross-claimant appeals from an order striking amended count 3 of its cross-complaint.

The abstract of record does not comply with the rules of this court and we are obliged to go to the record to ascertain the contents of the count stricken by the court. From the record it appears that the surety company is a cross-defendant in certain litigation the exact nature of which is not disclosed by the record, and that count 3 is a claim by the cross-claimant (2611 S. Halsted St. Bldg. Corp.), hereafter called building corporation, seeking to recover from the surety company on a bond executed by it as surety to the City of Chicago in the penal sum of \$10,000 upon the granting of a license to the principal in said bond to exercise the vocation of house mover, house raiser or shorer in the City of Chicago, conditioned that the principal "shall well and faithfully perform his duties in pursuing or exercising said vocation, **** shall pay all damages which may occur to any pavement, street, sidewalk, or to any pole, wire, cable, or electrical appliances, and shall pay to the City of Chicago all damages by reason of injury to trees or shrubbery owned or under the control or jurisdiction of the City of Chicago, and shall pay all damages which may occur to the property of any person or corporation in said city caused by or arising out of any act or thing done by such

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SECRET

U.S. DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY

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5. It is not a requirement that the defendant be a member of the same organization as the victim.

1. The first step in the process of identifying a problem is to determine the nature of the problem. This involves a thorough understanding of the situation and the factors that are contributing to the problem. Once the nature of the problem is understood, the next step is to identify the causes of the problem. This involves a detailed analysis of the situation and the factors that are contributing to the problem. Once the causes of the problem are identified, the next step is to develop a plan of action. This involves determining the steps that need to be taken to solve the problem. Once a plan of action is developed, the next step is to implement the plan. This involves putting the plan into action and monitoring the progress. Finally, the last step is to evaluate the results. This involves determining whether the problem has been solved and whether the plan of action was effective.

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House Mover, House Raiser or Shorer in and about the moving or raising of any house or building, or in shoring, in said city," etc. The count further charges failure to pay the damages suffered by the building corporation by reason of faulty shoring done by the principal of the bond.

A number of propositions are advanced by the surety company in support of the ruling of the court in dismissing the count. It is only necessary for us to refer to the objection raised by the surety company that the City of Chicago is not made a party defendant to the count dismissed. The condition of the bond, as shown above, covers not only claims like the one asserted by the building corporation, but also possible damages which might have been sustained by the City of Chicago. Should the penalty of the bond be exhausted in the payment of the claim of the building corporation, the City of Chicago would be without remedy for the damages, if any, sustained by it by reason of the alleged faulty shoring by the principal of the bond. It seems plain that the City of Chicago was an indispensable and necessary party to any action on the bond relied upon by the building corporation.

The order is affirmed.

ORDER AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

House Mover, House Raiser or Shorer in and about the moving or raising of any house or building, or in erecting, in any city, etc. The court further charges failure to pay the damages suffered by the building corporation by reason of fault showing done by the principal of the bond. A number of propositions are advanced by the surety company in support of the ruling of the court in dismissing the count. It is only necessary for us to reject the objection raised by the surety company that the City of Chicago is not such a party defendant in the count directed. The condition of the bond, as shown above, is not only a condition like the one created by the building corporation, but also possible damages which might have been sustained by the City of Chicago. Should the liability of the bond be exhausted in payment of the claim of the building corporation, the City of Chicago would be without remedy for its damages, and the City of Chicago would be without remedy for its damages by it by reason of the alleged fault showing by the principal of the bond. It seems plain that the City of Chicago is an indispensable and necessary party to any action on the bond relied upon by the building corporation. The order is affirmed.

ORDER AFFIRMED.

O'Connor, P. J., and Weinberg, J., concur.

43925

MARY W. McKAY, Executrix of the
Last Will and Testament of
DWIGHT McKAY, Deceased, and
LESLIE H. WHIPP,
Appellants,

v.

AUGUST A. WILHELM,
Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

331 I.A. 407

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal again from a judgment entered on a verdict for the defendant in their action for attorneys' fees for services rendered the defendant on the appeal to the Supreme court of the case of Scully v. Wilhelm, 368 Ill. 573. On the first appeal (316 Ill. App. 397) this court reversed the judgment on the ground that it was against the manifest weight of the evidence. On that appeal plaintiffs contended that the trial court erred in not permitting the abstract of record and briefs filed in the Supreme court to go to the jury. A majority of the court held that the abstract and briefs were not admissible in evidence. This holding is sound, and moreover it is binding on us on this appeal. Garrett v. Peirce, 84 Ill. App. 31.

On the second trial the evidence produced was substantially the same as that produced on the first trial, except that a brother of the plaintiff Whipp did not testify.

The case of Scully v. Wilhelm was a suit brought by heirs of Mrs. Wilhelm to set aside her marriage to Wilhelm and to set aside certain deeds to real estate worth \$100,000 or more from her to Wilhelm on the ground of fraud and undue influence. The proceedings in the trial court resulted in a decree for Wilhelm, dismissing the complaint for want of equity.

MARY W. MCKAY, Executrix of the
Last Will and Testament of
DWIGHT MCKAY, Deceased, and
LESLIE R. WHITE,
Appellants,

v.

ALBERT A. WILHELM,
Appellee.

FILED FOR
RECORD
JULY 10, 1934
COURT HOUSE
ST. LOUIS, MO.

MR. JUSTICE STEPHEN D. WHITE, JR., of the Court.

Plaintiffs a long time ago answered on
verdict for the defendant in their action for recovery, and
for services rendered the defendant as the result to the
Supreme court of the case of Scully v. Wilhelm, 309 Ill. 111.
On the first appeal (315 Ill. 121, 1927) the court reversed
the judgment on the ground that it was against the weight
weight of the evidence. On the second appeal the court
that the trial court erred in not reversing the judgment
of record and briefs filed in the Supreme court to be
jury. A majority of the court held that the defendant and
briefs were not admissible in evidence. This holding is correct
and moreover it is binding on us on this appeal. Wilhelm v.
Feins, 84 Ill. App. 21.

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influence. The proceedings in the trial court resulted in a
decree for Wilhelm, dismissing the complaint for want of equity.

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An appeal from this decree to the Supreme court was taken by the heirs in July 1937. The plaintiff Whipp and the decedent McKay represented Wilhelm in the trial court and thereafter, until the end of the litigation in June 1938. When the suit was instituted the defendant employed Whipp to represent him. McKay was later brought in as additional counsel. Except for the payment of a \$100 retainer fee to Whipp, no payments were made on account of services rendered or transactions had between the parties as to the fees to be paid until October 27, 1937. At that time the defendant suggested that \$50,000 would be a good fee, and Whipp insisted upon the payment of \$100,000. The following day, October 28, 1937, at a conference between Whipp, McKay and the defendant, defendant signed a paper prepared by Whipp reciting: ~~that~~ "in full payment and settlement of fees and services for the preparation and trial of the case" of Scully v. Wilhelm "in the Superior Court of Cook County, Illinois, case No. 591863." "I agree to pay to you the sum of \$75,000 as soon as the Final Account of August A. Wilhelm in the Estate of Mary Wilhelm, deceased is approved in the Probate Court of Cook County, Illinois. \$20,000 in cash and balance in United States of Am. Treasury Bonds." The Supreme court dismissed the appeal, and on December 14, 1937 defendant paid to Whipp and McKay in the First National Bank of Chicago the sum of \$75,000 and received from them a carbon copy of the agreement of October 28, 1937, with the indorsement over their signatures of the following: "The above is paid in full this 14th day of December, 1937." Shortly after this payment the Supreme court vacated its order of dismissal and Whipp and McKay returned to defendant \$73,000 of the amount previously paid them (each retained \$1,000), and thereupon proceeded to prepare and file briefs in the Supreme court, to argue it orally and to take all other steps necessary to protect the decree of the trial court. In April 1938 the

An appeal from this decree to the Supreme Court was taken by the heirs in July 1937. The plaintiff thing and the proceeds, Mckay represented Wilhelm in the trial court and thereafter, until the end of the litigation in June 1938. When the suit was instituted the defendant engaged thing to a general attorney. Mckay was later brought in as additional counsel. Except for the payment of a \$100 retainer fee to Mckay, no payments were made on account of services rendered by Mckay and his associates. The parties as to the fees to be paid until October 28, 1937. At that time the defendant requested that \$10,000 be paid as a bond, and which matured upon the payment of \$10,000. The following day, October 28, 1937, at a conference between Mckay, Mckay and the defendant, defendant signed a paper, known as "Whip and Mckay" in full payment and settlement of the debt and services for the preparation and trial of the case of Wilhelm v. Wilhelm in the Superior Court of Cook County, Illinois, case No. 591883. "I agree to pay to you the sum of \$10,000 as soon as the Final Account of August 1, 1937, in the Matter of Mary Wilhelm, deceased is approved in the Probate Court of Cook County, Illinois. \$20,000 in cash and balance in United States of Am. Treasury Bonds." The Supreme Court dismissed the appeal, and on December 14, 1937 defendant paid to Mckay and Mckay in the First National Bank of Chicago the sum of \$10,000 and received from them a carbon copy of the agreement of October 28, 1937, with the indorsement over their signatures of the following: "The above is paid in full this 14th day of December, 1937." Shortly after this payment the Supreme Court vacated its order of dismissal and Whip and Mckay returned to defendant \$25,000 of the amount previously paid them (each retained \$1,000), and thereupon proceeded to prepare and file briefs in the Supreme Court, to argue orally and to take all other steps necessary to protect the decree of the trial court. In April 1938 the

3.

decree of the trial court was affirmed, petition for rehearing was denied in June, and the full estate of Mrs. Wilhelm, consisting of more than \$300,000 in personal property, was turned over to the defendant.

After December 1937 no discussions or transactions relating to fees were had until July 6, 1938 when the parties again met in the vaults of the First National Bank of Chicago, and Wilhelm paid over to Whipp and McKay \$73,000. After payment had been made, the attorneys made a demand for further fees for services on the appeal to the Supreme court, and Whipp presented a statement dated July 3, 1938 for \$25,000 for such services. Defendant insisted that the \$75,000 he had paid covered all services rendered, including services in the Supreme court, and demanded the return to him of the receipt which had been given him on October 28, 1937 when the payment of \$75,000 was made. Upon the refusal of Wilhelm to make further payment, McKay withdrew from the conference. The defendant and Whipp went to the latter's office where Whipp prepared and gave to defendant a receipt for \$49,000, being payment in full for services rendered in the trial court only, and refused to give any other receipt. This action followed. McKay died before it was reached for trial. On the first trial Whipp produced a receipt signed by McKay for \$24,000 dated July 6, 1938, which he testified McKay left on the table in the vaults of the First National Bank of Chicago, that Wilhelm refused to take it, and that he, Whipp, picked it up and preserved it.

Plaintiffs contend that at the conference of October 28, 1937 it was agreed that if the appeal to the Supreme court went to a final conclusion on the merits, as it ultimately did, the attorneys were to receive an additional fee of \$25,000 for their services; that if the appeal should be sooner disposed

degree of the trial court, as a result of which, the trial court was denied in June, and the full amount of the judgment was paid consisting of some \$100,000. The judgment was turned over to the defendant.

After December 1937 no discovery was made on the trial court relative to facts which were held until July 1, 1938 when the trial court met in the vault of the court, which was held in the vault of the court and which said was to be held in the vault of the court. It had been made, the attorneys were not allowed to see the trial court for services on the appeal to the Supreme Court, which was presented a statement dated July 1, 1938, which was presented to the trial court. Defendant insisted that the trial court was not covered all services rendered, which was covered in the Supreme Court, and demanded the return of the trial court which had been given him on October 1, 1938, which was of \$125,000 was made. Upon the trial of the trial court, further payment, which was made to the trial court, the trial court and Whip went to the trial court, which was made to the trial court and gave to defendant a receipt for \$125,000, which was made in full for services rendered in the trial court, which was made to give any other receipt. This action was taken by the trial court before it was reached for trial. On the first trial, which produced a receipt signed by Whip for \$125,000 dated July 1, 1938, which he testified that he left on the table in the vault of the First National Bank of Chicago, that which was made to the trial court, and that he, Whip, picked it up and preserved it.

Plaintiffs contend that at the conference of October 28, 1937 it was agreed that if the appeal to the Supreme Court went to a final conclusion on the merits, as it ultimately did, the attorneys were to receive an additional fee of \$15,000 for their services; that if the appeal should be sooner disposed

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of, the attorneys would be liberal with the defendant in fixing the further amount to be paid them. Defendant contends that the sum of \$75,000 was the total fee for all services rendered and to be rendered. The determination of this issue rests upon the testimony of Whipp and of the defendant. Two juries have accepted the testimony of the defendant and rejected that of Whipp. Two trial judges, who heard and observed the witnesses, have approved the verdicts of the juries. A witness who had been secretary to McKay for a number of years testified that Whipp had offered her money if she would testify that defendant had promised to pay the additional fee of \$25,000. At the time the alleged agreement was entered into, the relation of attorney and client existed. The attorneys were required to give full explanation of the purport and meaning of the paper which they prepared and had their client execute. It appears from the record that the estate of Mrs. Wilhelm was in the hands of the First National Bank of Chicago until the final determination of Scully v. Wilhelm by the Supreme court. The \$75,000 which defendant agreed to pay, and which the attorneys claim was to cover services in the trial court only, was not to be paid until the determination of the case in the Supreme court and the approval of the final account in the Probate court permitting delivery of the estate to the defendant. If an additional sum was to be paid for services in the Supreme court it would have been due at that time, and experienced attorneys should have incorporated such an agreement in the paper prepared for defendant's signature in October 1937. Furthermore, the jury may have thought that the failure of the attorneys to present the statement for such services until after the balance of \$73,000, which defendant agreed to pay, was securely in their possession, weakened their claim for such additional services. We cannot say that the verdict is against the manifest weight of the evidence.

The judgment is affirmed.

O'Connor, P. J., and Feinberg, J. concur.

AFFIRMED.

of, the attorneys would be liable with the defendant in fixing the further amount to be paid there. Defendant's contention that the sum of \$75,000 was the total fee for all services rendered and to be rendered. The defendant's contention rests upon the testimony of him and of the witnesses. The jury have accepted the testimony of the defendant and rejected that of him. The jury, who heard and observed the witnesses, have approved the version of the facts. A witness who had been secretly in contact with the defendant and who had offered her money if she would testify that defendant had promised to pay him \$75,000. At the time the alleged agreement was entered into, the defendant of attorney and client - stated. The jury have rejected the give full explanation of the report as rendered in the paper which they prepared and had their own version. It appears from the record that the estate of the defendant was the first National Bank of Chicago until the first nationalization of Bank v. Chicago by the Supreme Court. The fact which defendant agreed to pay, and which the defendant claim was to cover services in the trial court only, was not to be paid until the termination of the case in the Supreme Court and the approval of the final account in the Supreme Court permitting delivery of the estate to the defendant. If an additional sum was to be paid for services in the Supreme Court it would have been due at that time, and executed at that time should have incorporated such an agreement in the paper presented for defendant's signature in October 1937. Furthermore, the jury may have thought that the failure of the attorneys to present the statement for such services until after the balance of \$75,000, which defendant agreed to pay, was secretly in their possession, weakened their claim for such additional services. He cannot say that the verdict is against the manifest weight of the evidence.

43951

FLORA D. SEEFELD and REX RUPPA,
Appellants,

v.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

THEODORE C. BAER, L. J. CULLEN,
R. O. FARRELL, L. H. BARKHAUSEN,
RANDOLPH BOHRER, 32 WEST RAN-
DOLPH CORPORATION, a corporation,
ORIENTAL ENTERTAINMENT CORPORATION,
a corporation, and HERMAN BRASH,
as trustee under the provisions
of a trust agreement dated
the 29th of January, 1946 and known as
the Brash Trust,

Appellees.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order striking their second amended and supplemental complaint and dismissing their suit.

The plaintiffs-Seefeld a stockholder of the defendant 32 West Randolph Corporation (hereafter called the corporation), and Rupp a holder of a trust certificate under a voting trust agreement covering substantially all of the stock of the corporation-sought to set aside a sale of certain assets of the corporation, to effect the removal of its directors and officers, to bring about its dissolution and liquidation, and to obtain other incidental relief.

Upon the foreclosure of a mortgage of United Masonic Temple Corporation the bondholders bought in the property described in the mortgage and organized a new company (the defendant corporation) to take title to the property. Each holder of the old bonds received the same principal amount of bonds of the corporation, and ten shares of the capital stock of the corporation for each \$1,000 bond held by him. Substantially all the stock of the corporation was placed in a voting trust, dated May 1, 1935, of which the defendants Baer, Cullen and Farrell were the trustees. These defendants were

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also the directors and officers of the corporation, The capital stock of the corporation consisted of 29,762 shares of common stock without par value, of which 28,061.1 shares of stock had been issued and were outstanding. The plaintiff Seefeld was the owner of 100 shares of stock of said corporation not held in the voting trust. Plaintiff Rupp was the beneficial holder of a voting trust certificate representing 150 shares of the stock of the defendant corporation. The outstanding bonds issued by the corporation were approximately \$2,525,500, substantially all of which were owned by stockholders of the corporation or holders of trust certificates under the voting trust. On or about December 5, 1945 the defendants Barkhausen and Bohrer, doing business as The Doubleby Company (not incorporated), submitted in writing an offer to purchase from the corporation certain leasehold interests of the corporation, buildings and improvements on the premises covered by said leases, and certain income, rents, issues and profits of said properties, being all or substantially all of the assets of the corporation, for the sum of \$140,305.50, upon condition that the holders of voting trust certificates representing two-thirds or more of the outstanding voting trust certificates approved in writing the proposed sale of the above mentioned assets and that the corporation not later than December 30, 1945 consented to the assignment of a certain lease of the Oriental Theatre to a corporation to be organized for the purpose of becoming the assignee of said lease, to be known as Oriental Entertainment Corporation or some similar name; that a directors' meeting be held not later than December 31, 1945, accepting, approving and ratifying the proposal of sale of the assets above mentioned and causing a meeting of the stockholders to be held on or before March 1, 1946 for the purpose of ratifying, confirming and

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approving the proposal. The offer further provided that if, at the time of submission of the offer for the approval of the stockholders at a stockholders' meeting, a higher bona fide offer in writing, together with a deposit of not less than \$140,305.50 (the amount deposited by the Doubleby Company with its offer) shall have been submitted to the corporation for the purchase of the above mentioned assets, the Doubleby Company should have ten days within which to meet such higher offer, and that upon the consummation of the sale the members of the Doubleby Company, as beneficiaries of a trust under which title to the property purchased was to be held, would pledge their beneficial rights under the trust as security for the outstanding bonds of the corporation. The holders of trust certificates representing 20,400 shares of the stock of the corporation, being more than two-thirds of the stock held in the voting trust and of the outstanding capital stock of the corporation, filed their written approval of the sale.

January 12, 1946, the directors of the corporation called a special meeting of the stockholders of the corporation to be held January 26, 1946, for the purpose of voting on the matter of sale and disposition of the assets of the corporation, subject to all of the liabilities thereof. On January 25, 1946 plaintiffs filed their original complaint in this action for a temporary injunction to restrain the holding of the meeting of the stockholders on the following day. An injunction was denied. The meeting of the stockholders was adjourned until January 29, 1946 in the forenoon, at which time Sol A. Hoffman submitted a written proposal offering to purchase the same assets, property and rights which the Doubleby Company had offered to purchase, upon the same terms and conditions, at an increased price of \$165,000 - Hoffman agreeing to do and perform all that the Doubleby Company are to do

reversed

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stockholders adopted a resolution reciting that

the foregoing offers, and providing: "Be it therefore

that the equities in the properties of this company be sold

disposed of and the directors of this company be, and they are

hereby authorized, empowered and directed in their sole dis-

cretion to fix any or all of the terms and conditions of any

such sale and the considerations to be received by the corpora-

tion for such equity provided that such equity shall not be sold

or disposed of for less than the sum of \$140,305.50, or on terms

less favorable to the corporation and its stockholders than those

set forth in the Doubleby proposal." The defendant Cullen voted

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20,400 shares in favor of the resolution and it was carried. Plaintiff Seefeld's stock was voted against the resolution. On the afternoon of January 29, 1946 Cullen and Farrell, being a majority of the directors of the corporation, held a meeting and authorized the sale of the assets mentioned in the Doubleby Company offer, to that company for \$165,000, and rejected the offer of Hoffman. The successful bidder paid the remainder of the purchase price on the same day and received from the corporation a deed to its nominee for the property. This deed was recorded early on the morning of January 30, 1946. The deposit of Hoffman was returned to him with notice of the acceptance of the Doubleby Company bid. February 8, 1946, plaintiffs filed their amended and supplemental complaint, which was stricken on motion of defendants. June 10, 1946, the second amended and supplemental complaint was filed. On motion of defendants this complaint was stricken and, plaintiffs refusing to plead further, the cause was dismissed for want of equity.

The latter complaint, covering 50 pages of the printed abstract, sets out the foregoing facts, with additional details, conclusions and argument. Attached to the complaint are 27 pages of exhibits. It is significant that nowhere in the complaint do the plaintiffs specifically charge the defendants with fraud. No hidden, corrupt or selfish motive for the acts or omissions of the voting trustees, directors and officers of the corporation is alleged. No secret or special profits to these defendants are shown. It is charged that these defendants preferred the Doubleby Company as purchasers of the assets of the corporation; that they failed to make proper provision to secure the reassignment of the Oriental Theatre lease in the event the Doubleby Company were not the successful

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bidders, until their attention was directed to their negligence in this respect; that they failed to secure a contract binding the Doubleby Company to place the management of the Oriental Theatre in the hands of the Essaness Theatres Corporation, although insisting that capable and experienced management of the theatre by the bidders for the assets of the corporation was an important if not a controlling factor in deciding in favor of the Doubleby Company; that after the stockholders' meeting on January 29, 1946 the defendant Farrell, with the knowledge and consent of Cullen, misled Hoffman into believing that his offers were being considered, although these defendants, controlling the board of directors, had already decided to make the sale to the Doubleby Company and did thereafter sell to that company. These allegations, which must be taken as true on the motion to strike, give no right of action to plaintiffs. No loss or injury to the corporation is shown. There is no allegation that Hoffman ever offered or was willing to offer more than \$165,000 for the property upon the conditions stated in the Doubleby Company offer. The alternative offer of Hoffman to pay \$225,000 was based upon different conditions, one of which was the omission of the offer to pledge the property purchased as additional security for the bondholders. Hoffman thought that the difference in the conditions of the two offers warranted him in offering \$60,000 more for the property if it could be bought on the terms stated in his alternative offer. Apparently the directors and officers of the corporation thought the terms of the Doubleby offer more favorable to the corporation. If they were wrong it was merely an error of judgment, in the absence of facts and circumstances showing fraud. Such error of judgment, if any, cannot be the basis of an action by a stockholder or the holder of a trust certificate. Wheeler v. Pullman

7.

Iron and Steel Co., 143 Ill. 197, 207.

The orders are affirmed.

ORDERS AFFIRMED.

O'Connor, P. J., concurs.

Feinberg, J., took no part.

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44027

BETTY YABLIN,

Appellee,

v.

CHARLES BROWN, R. J. EDERER
COMPANY, a Corporation, and
WALTER CONKLIN,

Defendants.

R. J. EDERER COMPANY, a
Corporation, and WALTER
CONKLIN,

Appellants.

APPEAL FROM ORDER CIRCUIT COURT
COOK COUNTY GRANTING NEW TRIAL.

331 I.A. 108

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant corporation and Conklin, its agent, hereafter called defendants, appeal from an order granting a motion for new trial in plaintiff's action for personal injuries sustained in a collision between an automobile driven by plaintiff's husband and in which she was riding, the automobile of defendants and the automobile of one Brown. Plaintiff sued defendants and Brown. The jury returned a verdict of not guilty as to all defendants, plaintiff's motion for a new trial as to Brown was denied and judgment entered in his favor. The motion for new trial as to the defendants appealing was granted, and leave given to appeal.

The evidence is without substantial conflict. Brown was driving his automobile north in the left lane for northbound traffic in the outer drive in Lincoln Park, Chicago; when approaching Fullerton avenue he had a flat tire; he stopped his car for the purpose of changing tires. Conklin, driving north in the left lane, was preceded by another car which, on approaching the stopped car of Brown, suddenly veered to the right to pass and exposed Brown's car to Conklin's view when the latter was 35 or 40 feet away; Conklin looked in his rear mirror and saw plain-

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705 m. later at midday. The wind died down & rain fell.

1. General Information about the subject of the document is as follows :

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7-908 SC Affidavit and Petition was also dated at New Brunswick

It is a challenge for us to deliver a better way of life.

Page 1 of 1

...and the ...

• Issues of

The evidence of

Excluded from work until further notice

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100-443887-100

the purpose of obtaining information, which is not to be used for the purpose of identifying the person or persons who are the source of the information.

plane, was preceded by another one which, on approaching the

the east of their exit of berries vineyard, moved to the bogate

exposed Brown's ear to Franklin's view when the latter was 37 or

40 feet away; Conklin looked in his rear mirror and saw a light-

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tiff's car in the lane immediately to the right and from 15 to 20 feet to the rear; Conklin immediately applied his brakes but, being unable to stop, struck the right rear of Brown's car with the left front of his car. Plaintiff's husband, hearing the crash, saw the stopped car and immediately applied his brakes, striking the right rear of Conklin's car with the left front of his car. Both automobiles were traveling around 30 miles an hour, keeping pace with the northbound traffic, which was heavy. There is nothing in the record to indicate that the trial court granted the new trial because the verdict was against the weight of the evidence, and such action would not have been warranted upon the record before us. It appears that a new trial was granted because the court, at the instance of the defendants, gave to the jury the following instruction: "The Court instructs the jury that if a person without fault on his part, is confronted with sudden danger or apparent sudden danger, the obligation resting upon him to exercise ordinary care for his own safety does not require him to act with the same deliberation and foresight which might be required under ordinary circumstances." The jury did not know at whose instance the instruction was given. It applied with equal effect to Conklin and to plaintiff's husband. It is identical with an instruction given on behalf of the plaintiff in Union Traction Co. v. Newmiller, 215 Ill. 383. Neither Conklin nor plaintiff's husband was under obligation to exercise any greater care for the safety of others than for the safety of themselves. We do not see how the instruction could have misled the jury to plaintiff's disadvantage.

The order granting a new trial is reversed and the cause remanded to the trial court with directions to proceed in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Feinberg, J., concur.

44045

ARTHUR J. SLINGERLAND,
Appellee,

v.

NONA SLINGERLAND, Executrix of
the Estate of H. H. Slingerland,
deceased,
Appellant.

APPEAL FROM SUPERIOR COURT
COOK COUNTY.

203
331 I.A. 409

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree directing an accounting. While the case was pending on exceptions to the master's report the original defendant died and his executrix was made defendant. She adopted the answers of the deceased defendant and any and all proceedings previously had or taken and acts previously done by him. For convenience the decedent will be referred to as the defendant.

Plaintiff's sworn complaint, filed August 17, 1942, was based on a written agreement of October 1930 whereby plaintiff was to acquire a 10 per cent interest in the manufacturing business of defendant, his brother, for \$20,000, to be paid in commissions earned by plaintiff less necessary living and traveling expenses. Defendant's sworn answer denied the partnership agreement and alleged that plaintiff was employed as a salesman upon a commission basis, receiving 15 per cent on all sales to the trade made by him and 5 per cent on sales to jobbers; that this arrangement was superseded by a new agreement on January 1, 1940, effective until June 30, 1942 when plaintiff left defendant's employment, whereby plaintiff was to receive 10 per cent on all sales to the trade made by him, 5 per cent on mail orders received from persons called on by him and 5 per cent on sales to jobbers.

A brother of the parties, who was defendant's office

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manager and buyer, was called as a witness by plaintiff. He testified that until 1940 plaintiff received 15 per cent on sales to retailers and 5 per cent ^{on sales} to jobbers, without any credit for mail order business; that it was not until 1940 that plaintiff worked on a commission of 10 per cent on direct sales and 5 per cent on mail orders. After this testimony plaintiff testified, and his wife corroborated him, that in February 1932 he returned the written partnership agreement to defendant because the defendant would not live up to it. He further testified that after that time neither he nor the defendant acted under the partnership agreement; that several days after the surrender of the contract defendant told him that he, plaintiff, would receive 10 per cent on personal business and 5 per cent on mail order business, and that his earnings would be retained toward his interest in the business. This testimony is denied by the defendant. It is stipulated that the books of defendant show that from 1930 to 1940 the plaintiff was credited on the basis of 15 per cent on sales to retailers and not on a basis of 10 per cent on direct sales and 5 per cent on mail orders and follow-ups. Plaintiff further testified that he did not ask for an accounting until 1935-1936. A former bookkeeper of defendant testified that plaintiff examined some accounts about which he was in doubt, but did not ask for an examination of the books. Defendant denies any request for an accounting until after 1939. In December 1940 and early January 1941 plaintiff wrote several letters to defendant claiming a balance due for commissions to December 31, 1939. In early January 1941 he received from the defendant a check for \$911.77, the balance due him on commissions for the year 1940 under the new arrangement, and at that time, at the request of defendant, indorsed on the statement of his account in his own handwriting,

manager and buyer, was called as a witness. He testified that until 1940 plaintiff received 15 per cent on sales to retailers and 5 per cent on orders, although, with the credit for mail order business, there is a net credit for that plaintiff worked on a commission of 10 per cent on direct sales and 5 per cent on mail orders. Plaintiff testified, and his corroborated him, that in February 1938 he returned the mail order business to defendant to defendant because the defendant would not pay him 15 per cent. He further testified that after that time defendant, the defendant asked him to do the business for him; that is, plaintiff, was a receiver of orders and a personal sales- man and 5 per cent on mail order business, and that the business would be retained toward his interest in the business. This testimony is backed by the defendant. It is established by the books of defendant show that from 1940 to 1944 plaintiff was credited on the basis of 10 per cent on orders to retailers and not on a basis of 5 per cent as direct sales and 5 per cent on mail orders and follow-up. Plaintiff further testified that he did not ask for an accounting until 1938-1939. A former bookkeeper of defendant testified that plaintiff had some accounts about which he was in doubt, and that he for an examination of the books. Defendant denies any request for an accounting until after 1938. In December 1940 and early January 1941 plaintiff wrote a verbal letter to defendant asking for a balance due for commissions to December 31, 1939. In early January 1941 he received from the defendant a check for \$11.75, the balance due him on commissions for the year 1940 under the new arrangement, and at that time, at the request of defendant, indorsed on the statement of his account in his own handwriting.

3.

"Rec'd to date in full to date A.J.S."

After the close of testimony before the master plaintiff on June 21, 1944 amended his complaint by alleging the surrender to defendant of the partnership agreement of October 1930, and that he on "to-wit, March 1, 1932 entered into an oral contract in modification or amendment thereof in and by which the defendant was to pay plaintiff a commission of 10 per cent on personal sales made by him, 5 per cent on mail order sales, and 5 per cent on all jobbers' sales." By his sworn answer defendant denied the new matters set up in plaintiff's amendment, and as a further defense set up the 5-year statute of limitations and the defense of accord and satisfaction, alleging that on or about December 31, 1940, there being a dispute between the parties as to the amount then due to plaintiff, defendant paid to plaintiff \$911.77, and that this sum was accepted by plaintiff in full settlement of all claims to that date, the plaintiff executing a receipt in full. No reply was filed to this answer.

The master's report found that the parties had entered into the partnership agreement as claimed by plaintiff; that this agreement had been surrendered to defendant in February 1932, and that thereafter the parties had entered into an oral contract of employment on the terms claimed by plaintiff. The defenses of the statute of limitations and of accord and satisfaction were ignored by the master. Defendant's objections to the report, including objections to the failure of the master to find for the defendant on these special defenses, were overruled. The objections, standing as exceptions, were also overruled by the trial court and a decree entered directing an accounting on the basis of the contract of February 1932, from that time to December 31, 1939.

Plaintiff's testimony is self-contradictory. He testified

"Rec'd to 1st in July 1932."

After the close of the trial, the court on June 21, 1932, rendered his decision in favor of the defendant of the plaintiff's motion to set aside the verdict. The court held that the plaintiff had failed to establish its case by a preponderance of the evidence. The court also held that the defendant's motion to set aside the verdict was timely and proper. The court entered its judgment in favor of the defendant on June 21, 1932.

The plaintiff's testimony is self-contradictory. He testified that time to December 31, 1932.

accounting on the basis of the contract of February 1932, from ruled by the trial court and a referee entered directing an accounting on the basis of the contract of February 1932, from ruled. The objections, stating an exception, were also overruled. The objections, stating an exception, were also overruled. The objections, stating an exception, were also overruled.

to find for the defendant on these special grounds, very over- the report, including objections to the findings of the court. The objections, stating an exception, were also overruled.

defenses of the plaintiff. The objections, stating an exception, were also overruled. The objections, stating an exception, were also overruled.

contract of assignment on the basis of the findings of the court. The objections, stating an exception, were also overruled.

into the report made apparent that the plaintiff's motion to set aside the verdict was timely and proper. The court entered its judgment in favor of the defendant on June 21, 1932.

the plaintiff's motion to set aside the verdict was timely and proper. The court entered its judgment in favor of the defendant on June 21, 1932.

the plaintiff's motion to set aside the verdict was timely and proper. The court entered its judgment in favor of the defendant on June 21, 1932.

4.

on direct examination that when the new arrangement was entered into in 1932 defendant stated that plaintiff's earnings would be retained toward his interest in the business. On cross-examination he testified that after his return of the contract to defendant, neither he nor defendant acted under that contract at any time. Furthermore, his failure to mention in the original sworn complaint the return or surrender of the partnership agreement and the new arrangement in respect to commissions, casts suspicion upon his claims in that respect. He is contradicted by the positive testimony of the defendant and defendant's office manager, and by the very important fact stipulated by the parties that during all the time from 1930 to 1939 plaintiff's commissions were carried on defendant's books at 15 per cent on sales to retailers, 5 per cent to jobbers and no allowance on mail orders or follow-ups. The finding of the master and the finding of the chancellor in the decree that the new arrangement as to commissions was made in 1932, is against the manifest weight of the evidence.

By failing to reply to the defenses of the statute of limitations and accord and satisfaction set up in defendant's answer to plaintiff's amendment to the complaint, plaintiff admits them. Village of Palatine v. Dahle, 385 Ill. 621; Firke v. McClure, 389 Ill. 543. The allegations in the amendment to the complaint in 1944 constitute the statement of a new cause of action, based upon an oral contract. The employment of plaintiff was a hiring by the year (Ennis v. Pullman Palace Car Co., 165 Ill. 161), and consequently all claims for an accounting as to any years up to 1939 would be barred. Moreover, the defense of accord and satisfaction is fully supported by the evidence, which shows plaintiff's claim for a balance due him

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1.

[Faint handwritten notes]

... and ...

$\frac{1}{2} \left(\frac{1}{2} \right) = \frac{1}{4}$

5.

and his receipt in full upon a settlement in January 1941.

The decree is reversed and the cause is remanded with directions to enter a decree dismissing the complaint for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Feinberg, J., concur.

Let $f = (f_1, \dots, f_n)$ be a function from \mathbb{R}^n to \mathbb{R}^m . Then f is said to be

continuous at $a \in \mathbb{R}^n$ if for every $\epsilon > 0$ there exists a $\delta > 0$ such that

whenever $\|x - a\| < \delta$ we have $\|f(x) - f(a)\| < \epsilon$.

and hence

$$f \text{ is continuous at } a \iff \lim_{x \rightarrow a} f(x) = f(a).$$

43972

GEORGE LEONARD,)
Appellee,)
v.)
JOHN ANDERSON,)
Appellant.)

210 A
APPEAL FROM THE MUNICIPAL
COURT OF CHICAGO.

331 I.A. 410

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a forcible detainer action brought by plaintiff, George Leonard, to recover from defendant, John Anderson, the possession of the third floor apartment at 2514 W. Belle Plaine avenue, Chicago, Illinois. The case was tried before the court without a jury. Finding and judgment were entered in favor of plaintiff and defendant appeals.

The material facts necessary to be considered are undisputed. The Office of Price Administration issued to plaintiff a certificate of eviction granting to him the right six months after February 27, 1946, to obtain possession of the premises involved herein in accordance with the requirements of local law. Subsequent to the issuance of said certificate authorizing the institution of an action of forcible detainer against defendant after August 27, 1946, plaintiff as lessor and defendant as lessee entered into a written lease, dated May 1, 1946, for the period from May 1, 1946 to May 31, 1946. Said written lease contained the following provision:

"This lease may be renewed from month to month by verbal agreement of both parties. But not for longer than Aug. 27th, 1946."

Defendant paid rent for the premises only until August 27, 1946 and when he refused to surrender possession thereof on said date to plaintiff, the latter brought this action of forcible detainer on August 29, 1946. Plaintiff served no notice on defendant to terminate the tenancy.

IN SENATE
JANUARY 17, 1946
REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE
OF THE STATE OF NEW YORK
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
ON JANUARY 10, 1946
RELATIVE TO THE
LANDS BELONGING TO THE
STATE OF NEW YORK

That is a forcible action brought by Plaintiff, George Deane, to recover from Defendant, John Anderson, the possession of the land known as the "John Anderson Farm" located in the town of Deane, County of Hamilton, State of New York. The case was tried before the court in the month of January, 1946. The court rendered its verdict in favor of Plaintiff and Defendant was ordered to pay the costs of the action.

The material facts of the case are as follows: The Office of State Lands and Forests has been authorized to acquire by purchase or otherwise any land owned by the State of New York which is suitable for reforestation. On or about January 27, 1946, the Office of State Lands and Forests advised Plaintiff that it was desirous of acquiring the land known as the "John Anderson Farm" for reforestation purposes. Plaintiff, in response to this advice, advised the Office of State Lands and Forests that he was willing to sell the land to the State for the sum of \$10,000.00. On or about February 1, 1946, the Office of State Lands and Forests advised Plaintiff that it had accepted his offer and that it was entering into a written lease with him for the period from May 1, 1946 to May 31, 1947. Plaintiff, in response to this advice, advised the Office of State Lands and Forests that he was willing to enter into a written lease with the State for the period from May 1, 1946 to May 31, 1947. The following provisions were contained in the lease:

"This lease may be renewed from month to month by verbal agreement of both parties. It shall not be longer than one year." 1946.

Defendant paid rent for the premises only until August 27, 1946 and when he refused to surrender possession thereof on said date to Plaintiff, the latter brought this action of forcible detainer on August 29, 1946. Plaintiff served no notice on defendant to terminate the tenancy.

It is first contended that plaintiff had no right to maintain this action because he as landlord failed to give defendant thirty days' written notice as required by section 6 of the Landlord and Tenant Act (par. 6, chap. 80, Ill. Rev. Stat. 1945), which provides as follows:

"In all cases of tenancy for any term less than one year, where the tenant holds over without special agreement, the landlord may terminate the tenancy by thirty days' notice, in writing, and may maintain an action for forcible entry and detainer or ejectment."

This section of the act has no application to the situation presented here. Prior to May 1, 1946 defendant occupied the premises under a written lease for a year. Commencing May 1, 1946 he occupied the apartment under a written lease for one month and that lease contained a special agreement that the lease might be renewed by the parties from month to month but in no event for a period longer than August 27, 1946. That tenancy was a tenancy from month to month from May 1, 1946 to August 27, 1946 but defendant's occupancy during such period did not constitute a holdover tenancy from month to month, since, as has been seen, he remained in possession until August 27, 1946 under the special agreement, heretofore set forth, contained in the lease of May 1, 1946. It will be noted that the foregoing section requiring thirty days' written notice of termination of tenancy applies only where the tenant holds over without special agreement.

Section 12 of the Landlord and Tenant Act expressly provides that where, as here, the tenancy is for a specific, definite period the landlord is not required to give notice of the termination of such tenancy. That section (par. 12, chap. 80, Ill. Rev. Stat. 1945), is as follows:

"When the tenancy is for a certain period, and the term expires by the terms of the lease, the tenant is then bound to surrender possession, and no notice to quit or demand of possession is necessary."

In considering this section in Treat v. Gasmire, 176 Ill. App. 91, which was a forcible detainer action, the court said at p. 93:

"Where the term expires no notice to quit is necessary, and the lessee or any person claiming under him is by the express provision of the act [Landlord and Tenant] liable to this action [Forcible Detainer]."

It is also contended that plaintiff failed to prove by a preponderance of the evidence that he acted in good faith in seeking to recover possession of the apartment in question for his own immediate use and occupancy as a dwelling and that he had an immediate and compelling necessity for such occupancy.

In support of this contention defendant cites Lakowski v. Kustohs, 328 A. 557, and Svigum v. Phillips, 217 Minn. 586. In neither of these cases was there a certificate of eviction granted by the Office of Price Administration. Such a certificate was granted by the Office of Price Administration to the plaintiff in the instant case. A contention similar to that under consideration was advanced in Bochner v. Rosen, 326 Ill. App. 382, where the landlord had been granted a certificate of eviction and the tenant undertook to interpose the defense that the defendant did not in good faith desire the premises for her own personal use. In that case the court said at pp. 384-385:

"The certificate of eviction was therefore in force and was conclusive of plaintiff's right to proceed under local law without regard to the Price Administration Act. Indeed, the Municipal Court of Chicago was wholly without jurisdiction to try the question of plaintiff's intention to personally occupy the premises and the evidence introduced was therefore wholly inadmissible. Jones v. Shields, 63 Cal. App. (2d) 846, 146 P. (2d) 735; United States v.

and the term of the lease, the lease is not
bound to surrender possession, and no notice is
required of a surrender in such a case.

In considering this question, it is clear that

the lease is not a lease in the strict sense of the word,

because it is not a lease for a term of years.

When the term of the lease expires, the lease is not
bound to surrender possession, and no notice is
required of a surrender in such a case.

It is also clear that the lease is not a lease

for a term of years, because it is not a lease

for a term of years, because it is not a lease

for a term of years, because it is not a lease

for a term of years, because it is not a lease

for a term of years.

In support of this position, it is pointed out that

the lease is not a lease for a term of years, because it is not a lease

for a term of years, because it is not a lease

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for a term of years, because it is not a lease

for a term of years, because it is not a lease

for a term of years.

"The certificate of eviction was filed in 1935

and was conclusive of plaintiff's right to possession

local law without regard to the state constitution.

Indeed, the Municipal Court of Chicago has held that

plaintiff is entitled to possession of the premises and the

Hansen, Dist. Ct. E. D. Wis., 52 Fed. Supp. 693. The evidence tending to show plaintiff wished the premises for another was mere hearsay and inadmissible, and since the trial court was without jurisdiction to try that issue it should not have been admitted at all. Lockerty v. Phillips, 319 U. S. 182; Rottenberg v. United States, 137 F. (2d) 850."

(To the same effect is Kubiszewski v. Lynch, 326 Ill. App. 596 (Abst.).)

It seems clear that where a certificate of eviction has been issued by the Office of Price Administration after its determination of the issues of compelling necessity and good faith, the only issues which the trial court has jurisdiction to determine are those which may be properly raised under local law or, in other words, under the law of this state.

The judgment of the Municipal court of Chicago was properly entered and it is therefore affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

44030

HAROLD U. ROETH and
NADINE K. ROETH,
Appellees,

v.

FRITZ F. BOEHM and
ERNA I. BOEHM,
Appellants.

211 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

3311A. 410²

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs, Harold U. Roeth and Nadine K. Roeth, procured the entry of a summary judgment for \$1,000 against defendants, Fritz F. Boehm and Erna I. Boehm, in the Municipal court of Chicago. Defendants appeal. Plaintiffs filed no brief in this court.

Plaintiffs' statement of claim alleged in substance that on March 4, 1946 they entered into a written agreement with the Boehms for the purchase of their property at 18510 Perth avenue, Homewood, Illinois; that under said agreement they were to be furnished with a report of title within 30 days showing a merchantable title in defendants; that they agreed to pay defendants \$16,500 for the property if the title of the Boehms was shown to be merchantable; that at the time they signed the agreement they paid \$1,000 to Fred W. Egel, the broker who negotiated the deal, said earnest money to be applied on the purchase price if defendants' title was merchantable; that if defendants' title was not merchantable the earnest money was to be returned to plaintiffs at their option; that on March 20, 1946 they received the title report from defendants, which showed an outstanding mortgage on the property in the sum of \$5400; that the purchase agreement did not mention said mortgage and made no provision for its assumption or payment; that on March 27, 1946 their attorney advised the Boehms in writing that the title report showed that their title was not merchantable and that plaintiffs "exercise their option

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was not merchantable and that plaintiff's "retained their option
Joehns in writing that the title report showed that their title
or payment; that on March 27, 1945 their attorney advised the
not mention said mortgage and make no provision for the same.
the property in the sum of \$1400; that the plaintiff's agreement of
report from defendants, which showed an outstanding note, on
at their option; that on March 27, 1945 they exercised the
merchantable the earnest money was to be paid to plaintiff's
ants' title was in dispute. The title was in dispute and that
said earnest money to be paid to or for the benefit of the
held of, to be paid to, held, the same to be paid to the local
the defendant; that their title was in dispute and that they
120.70 for the property in the sum of \$1400.00 and a claim to
claimable title in defendant; that the plaintiff's property was
plaintiff. With a record of title in plaintiff's name and a claim
homestead, Illinois; that on or about March 27, 1945 they were to be

to rescind and hereby rescind their offer to buy said real estate and demand *** the refund" of their \$1,000 deposit; that on March 28, 1946 defendants' attorney wrote plaintiffs' attorney denying that the title report showed that defendants' title was unmerchantable; and that on May 3, 1946 defendants notified plaintiffs that they would exercise their option under the contract and declare a forfeiture of the deposit. The statement of claim concluded with a prayer for judgment for \$1,000 with interest thereon from March 27, 1946.

The purchase contract, which was attached to and made a part of the statement of claim, was drawn on a legal form entitled "Offer to Buy Real Estate." The offer was signed by plaintiffs on March 4, 1946 and its acceptance was signed by defendants on the same day. The contract recited that plaintiffs deposited \$1,000 as earnest money with their offer, that the contract and the deposit were to be held by Egel, the broker, in whose office the deal was to be closed and that said broker was to receive a commission at the "Chicago Real Estate Board Rate." The space opposite the printed words, "Encumbrance deducted," on the contract form was left blank. The contract contained a provision that plaintiffs were to receive from defendants within 30 days a report of title issued by the Chicago Title and Trust Company and immediately thereafter provided as follows:

"When the said title papers have been furnished the undersigned [vendees] shall close the deal within ten days if the title is merchantable, and if the title is not merchantable, the undersigned may, at his option, rescind this contract and have the deposit money refunded, whereupon this contract shall become null and void. But if the undersigned defaults in this contract, the deposit is at your [vendors'] option to be forfeited, as liquidated damages, first paying the real estate broker's commission and expenses incurred, and rendering the balance to you, and the contract shall become null and void. *** a failure to appear upon notice to close the deal at the place mentioned in this contract shall be a default. *** And you

to rescind and repay money received herein off to my said real estate and demand the return of same. I, the undersigned, do hereby certify that on March 28, 1940 defendant's attorney wrote plaintiff's attorney denying that the title report showed the title was unmarketable; and that on May 1, 1940 plaintiff notified plaintiff's that they would exercise their option under the contract and deposit a certificate of the deposit. The statement of claim concluded with a prayer for judgment for \$1,000 with interest thereon from March 1, 1940. The purchase contract, which was made by the defendant as a part of the statement of claim, was signed by the defendant and entitled "Offer to Buy and Sell" and the signature was signed by plaintiff on March 1, 1940 and the signature was signed by defendant on the same day. The contract recited that plaintiff deposited \$1,000 as earnest money with their offer, that the contract and the deposit were to be held by the broker, in whose office the deal was to be closed and that said broker was to receive a commission on the "purchase and sale of real estate." The space opposite the printed words, "None-Interest Deducted," on the contract form was left blank. The contract contained a provision that plaintiff was to receive from defendant within 30 days a report of title issued by the Chicago Title and Trust Company and American Title Guaranty provided as follows:

"When the said title report has been received by the undersigned [vendor], he shall close the deal within ten days if the title is marketable, and if the title is not marketable, the undersigned may, at his option, rescind this contract and have the deposit money returned, whereupon this contract shall become null and void. But if the undersigned defaults in this contract, the deposit is at your [vendors'] option to be forfeited, as liquidated damages, first paying the real estate broker's commission and expenses incurred, and returning the balance to you, and the contract shall become null and void. *** a failure to appear upon notice to close the deal at the place mentioned in this contract shall be a default. *** and you

may remove any objections to the title at the time of closing the deal if the same can be done at such time."
(Italics ours.)

The title report furnished to plaintiffs on March 20, 1946 was also attached to and made a part of the statement of claim. This report shows that the title to the property was in the defendants and that it was subject to a mortgage described as follows:

"(7) Mortgage dated January 13, 1941 and recorded on February 1, 1941 as document 12616929 made by Fritz F. Boehm and Erna I. Boehm, his wife to The South East National Bank of Chicago, a National Banking Association to secure a note for five thousand four hundred dollars payable to the order of mortgagee with interest at 4-1/2% per annum, on the unpaid balance until paid, said principal and interest payable in installments of thirty and 02/100 dollars on June 1, 1941 and a like sum on the first of each month thereafter until fully paid except that the final payment of principal and interest, if not sooner paid shall be due and payable May 1, 1966, and the covenants, Agreements and Conditions therein contained."

In defendants statement of defense they admitted that they entered into the contract in question for the sale of their property to plaintiffs for \$16,500 if the title report showed their title to be merchantable. They admitted that the title report showed an outstanding mortgage against their property but denied that said mortgage rendered their title unmerchantable or violated any provision of the purchase agreement. They denied that the contract failed to provide for the assumption or payment of said mortgage. They admitted receiving plaintiffs' notice of rescission and demand for refund of the \$1,000 deposit but denied that plaintiffs were entitled to such refund. They admitted that their attorney wrote plaintiffs' attorney denying that defendants title was not merchantable and that they notified plaintiffs that they would exercise their option to forfeit the contract and deposit because of plaintiffs' default. The statement of defense then alleged that defendants had fully performed under the contract; that plaintiffs had defaulted and were not entitled to a return of the deposit; and

to a 100% yield of white, soft, amorphous polymer with
a molecular weight of 100,000 and a glass transition temperature
of 100°C.

[illegible]

had fully performed under the contract; that plaintiffs had a
default. The statement of defense then alleged that defendant
option to forfeit the contract and deposit had been of plaintiff
that they notified plaintiffs that they would exercise their
attorney denying that defendant is liable and responsible
refund. They admitted in their report that plaintiffs
\$1,000 deposit but denied that plaintiffs were entitled to an
plaintiffs' notice of rescission in 1964 on the ground of the
rescission or release of said property. They further stated
went. They stated that the contract was made for the
unrecoverable or violated any provision of the business transac-
properly but denied that they were entitled to their title
title report showed in 1964 that they were not their
showed their title to be valid title. They stated that the
their report to plaintiffs that they were not entitled to a bond
they entered into the contract in violation of the law of the
In defendant's statement of defense it was alleged that

that defendants rather than plaintiffs suffered damage due to plaintiffs' default in refusing to consummate the deal for the purchase of the property.

After defendants filed their statement of defense, plaintiffs filed a motion for summary judgment supported by the affidavit of their attorney. This affidavit reiterated the allegations of the statement of claim and statement of defense as to the execution of the contract of purchase and the provisions thereof relating to defendants' obligation to furnish a title report showing that they had a merchantable title to the property. The affidavit then averred that the title report showed an outstanding mortgage on defendants' property; that the contract did not contemplate that there was a mortgage on the property and made no provision for the assumption or payment thereof but provided on the contrary that the full purchase price (\$16,500) would be paid upon the closing of the deal; that defendants' answer admitted the facts alleged in the statement of claim but denied their legal liability; that "the sole question involved in this case is whether the report of the Chicago Title and Trust Company showed a merchantable title in defendants"; and that "said question is a legal question and ought to be determined by this court on plaintiffs' motion for summary judgment."

In opposition to plaintiffs' motion for summary judgment defendants filed their own counter affidavits and that of their attorney. These counter affidavits call attention to the fact that the purchase contract provided that defendants "may remove any objections to the title at the time of closing the deal if the same can be done at such time" and they also call attention to the fact that the outstanding mortgage shown by the report of the Chicago Title and Trust Company provided

that it might be paid in full upon defendants' election at any time prior to its maturity. The counter affidavits then set forth facts showing that the defendants had arranged with the holder of the mortgage to pay the full amount due thereon with interest on March 31, 1946, which was prior to the time allowed by the contract for the closing of the deal for the purchase of the property.

After a hearing on plaintiffs' motion for summary judgment and their attorney's affidavit filed in support thereof and defendants' counter affidavits, the trial court granted said motion and entered judgment in favor of plaintiffs and against defendants for \$1,000 and \$29.44 interest.

While the purchase agreement provided that, if the report of the Chicago Title and Trust Company showed that defendants did not have a merchantable title, plaintiffs might rescind the contract and have their \$1,000 deposit refunded, it also provided that defendants "may remove any objections to the title at the time of closing the deal if the same can be done at such time." This latter provision clearly gave defendants the right to pay the mortgage indebtedness upon the closing of the deal either out of the proceeds of the sale or out of separate funds of their own, since under the terms of the mortgage they were afforded the privilege of prepayment in full at any time.

The fact that the purchase contract was silent as to the existence of the mortgage did not militate against defendants' right to pay the mortgage and have same released at the time the deal was closed and there is no question in this case of plaintiffs' assumption or payment of the mortgage.

As heretofore stated, defendants' counter affidavits set forth facts which showed that in accordance with the provisions

of the mortgage the holder thereof agreed in writing with them that payment in full would be accepted and the mortgage released at or prior to the time of closing the deal. With the mortgage released when the deal was closed defendants certainly could have conveyed a merchantable title to plaintiffs at that time.

It is improperly assumed in both plaintiffs' statement of claim and the affidavit filed by them in support of their motion for summary judgment that the mortgage against the property reported by the Chicago Title and Trust Company rendered defendants' title unmerchantable as a matter of law. It has been repeatedly held, even in the absence of a provision in a contract for the sale of real estate granting the vendor the right to remove objections to the title at the time of closing the deal, that the existence of an unpaid mortgage does not necessarily render the title of the owner of the mortgaged property unmerchantable. In Lane v. Lesser, 135 Ill. 567, which involved an action to rescind a real estate purchase contract, deeds of conveyance were tendered but the defendant (purchaser) refused to accept them on the ground that several trust deeds on the land had not been theretofore released. There the court said at p. 580:

"The evidence warrants the conclusion that Lieb and Lesser [plaintiffs] had arrangements made *** with the holders of the several incumbrances on the three blocks, so as to be able, on that day, to perform the contract on their part, *** by having all of said incumbrances satisfied and discharged ***. They therefore were ready, able and willing to perform the contract on their part ***."

The Lane case is cited as authority for the following statement in 57 A.L.R. at p. 1381: "The vendor's title will not, however, be held to be unmarketable because of a mortgage against the land, where the vendor has secured, or is able and willing to secure, its release or discharge at the time fixed for performance."

of the mortgage the holder thereof is bound in equity to see that payment in full would be made and the mortgage is not released at or prior to the time of closing the deal. With the mortgage released when the deal was closed, defendants could have conveyed a marketable title to the plaintiff at that time.

It is improperly assumed in both plaintiffs' statement of claim and the affidavit filed by them in support of their motion for summary judgment that the mortgage was not properly released by the title and closing company. It has been repeatedly held, even in the absence of a provision in a contract for the sale of real estate, that the vendor has a right to remove objections to the title at the time of closing the deal, that the existence of an unmarketable mortgage does not necessarily render the title of the vendor of the mortgaged property unmarketable. In *James v. Fox*, 111, 100, which involved an action to rescind a contract to purchase land, deeds of conveyance were tendered and the defendant (purchaser) refused to accept them on the ground that several third parties on the land had not been theretofore released. There the court said at p. 580:

"This evidence warrants the finding that the landowner [plaintiff] had arrangements made with the holders of the several incumbrances on the three blocks, so as to be able, on that day, to perform the contract on that day, and by having all of said incumbrances satisfied and discharged ***. They therefore were ready, able and willing to perform the contract on their part ***."

The *James* case is cited as authority for the following statement in 27 A.L.R. at p. 1381: "The vendor's title will not, however, be held to be unmarketable because of a mortgage against the land, where the vendor has secured, or is able and willing to secure, its release or discharge at the time fixed for per-

In Claude v. Richardson, 127 Iowa 623, the court said at p. 625:

"True, there was a mortgage on the property, but the vendor was in a situation to have it satisfied and the abstract perfected. *** In Downey v. Riggs, 102 Iowa 88, we quoted approvingly from Warvelle on Vendors, 949: 'When a vendee who has paid money upon a contract of purchase, refuses to proceed, he cannot, save under exceptional circumstances, sustain an action to recover back the amount of the payments so made.' No exceptional circumstances appear in this case save the existence of the mortgage, and the satisfaction of that was within the control of defendant. The defendant was not in default, and for this reason the petition should have been dismissed."

In Union Bag & Paper Corp. v. Bischoff, 255 Fed. 187, it was held that a mortgage may be discharged out of the purchase money if the vendor is in a position to obtain a release of same.

The conclusion set forth in plaintiffs' statement of claim and in the affidavit filed in support of their motion for summary judgment that defendants' title was unmerchantable was predicated solely on the fact that the title report of the Chicago Title and Trust Company showed an outstanding mortgage against the property. As has been seen, that fact alone did not render defendants' title unmerchantable. Defendants, having shown by their counter affidavits that they had made arrangements with the holder of the mortgage to pay same and have it released at or prior to the time of the closing of the deal, joined issue with plaintiffs as to whether or not their title was merchantable. That was a triable issue of fact, which under the law the trial court could not determine on a motion for a summary judgment.

The judgment order of the Municipal court of Chicago, including the order granting plaintiffs' motion for summary judgment, is reversed and the cause is remanded with directions that it be tried on its merits.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

43311

DAVID J. JONES and ELSA K. JONES,)
Appellants,) APPEAL FROM CIRCUIT
v.) COURT, COOK COUNTY.

CHICAGO TITLE AND TRUST COMPANY,)
Appellee. 331 I.A. 411

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action at law for fraud and deceit. Defendant's motion in the nature of a special demurrer, under section 45 of the Civil Practice Act (Ill. Rev. Stat. 1945, ch. 110), to dismiss the amended complaint, as amended, and for judgment, was sustained upon the sole ground of the Statute of Limitations (Ill. Rev. Stat. 1945, ch. 83, sec. 22), and plaintiffs having elected to stand upon the amended complaint, judgment was entered for defendant, from which plaintiffs appeal.

The amended complaint, as amended (hereinafter referred to as the complaint), alleged in substance that on February 15, 1926 the Chicago Title and Trust Company, as trustee, J. W. McCormack, as trust manager, and the trust company in its individual capacity executed a certain trust agreement creating a subdivision land trust wherein plaintiffs acquired a certificate representing 10,000 out of 175,000 shares of beneficial interest in the trust estate; that by reason of pleaded facts unknown to plaintiffs and fraudulently concealed from them by defendant, the said certificate was of the value of \$30,000; that by means of pleaded representations and concealments the defendant through its agents induced plaintiffs in 1933 to sell their certificate for \$5125, and fraudulently concealed from plaintiffs the fact that the defendant itself was the actual purchaser in its personal capacity and not as trustee, and for its own individual benefit; that plaintiffs relied on all the

alleged representations and thereby were led to believe that the certificate was worth not to exceed \$5125 and that the actual purchaser was some person other than the defendant; and it is alleged in general terms, through some 17 paragraphs of the complaint, that defendant knew and concealed from plaintiffs the following facts and represented to plaintiffs that none of them was true or existent: (1) that the manager had embezzled large sums of money that belonged to the trust which the defendant had permitted him to withhold in violation of explicit provisions of the trust agreement; (2) that the trustee had permitted the manager wrongfully to withdraw other large sums from the trust fund held by the trustee; (3) that the manager, with the knowledge of the defendant, had retained moneys which he had collected from customers for the payment of taxes owing by them, and that defendant had then paid those taxes out of other trust funds in its own hands and without requiring the manager to account or remit; (4) that the defendant had wilfully and wrongfully paid the manager out of the trust funds other sums in alleged reimbursement of advances falsely alleged to have been made by the manager, the defendant well knowing that the manager was indebted to the trust; (5) that defendant had knowingly conveyed real estate belonging to the trust without receiving the purchase price therefor, as required by the trust agreement; (6) that defendant, in its individual capacity, claimed to hold and own notes issued by the trustee as a purported obligation of the trust estate, and had received a stated sum on account thereof sufficient to discharge said notes, but falsely pretended that they remained unsatisfied, and that there were no funds available for their payment; (7) that the defendant knowingly became indebted to the trust for a stated sum; (8) that defendant had failed to require, keep or receive reports from the manager of his collections of trust funds; and (9) that defendant

had procured from named public accountants an audit of the trust assets and operations which demonstrated the foregoing defalcations, liabilities and other facts. The complaint further alleged that defendant, for the purpose of concealing from plaintiffs all knowledge of said audit and of defendant's purpose to acquire plaintiffs' certificate for itself, fraudulently employed the manager as defendant's agent to represent to plaintiffs that the trust estate was in arrears on said notes, that foreclosure was impending, that there was no available defense and that there were no funds to satisfy the notes, whereby plaintiffs were induced to sell their certificate. It is further alleged that to conceal all the foregoing circumstances from plaintiffs and to induce them to sell their certificate without knowing that defendant was the purchaser, defendant perpetrated a scheme involving the creation of a "dummy" corporation, ostensibly independent but actually a mere creature of the defendant, for the sole purpose of acquiring the certificates while concealing defendant's part in the transaction.

Defendant's motion to dismiss specified some 28 separate grounds in support of its contention that the complaint was substantially insufficient in law and that none of the matters and things therein alleged stated a cause of action against defendant. The major portion of its brief is devoted to an analysis of the complaint, seeking to show that the allegations therein set forth are mere expressions, characterizations, epithets and conclusions; that the allegations of the pleader charging alleged fraud, deceit, concealment, misrepresentation, conspiracy, neglect, breach of trust and wrongful conduct on the part of defendant, are mere legal conclusions, not supported by any well pleaded allegations of ultimate fact; that various documents are incorporated in the complaint which render it defective as pleading evidence rather than ultimate fact, and that none of the alleged claims sought to

be charged against defendant is founded on any of said documents,

Among the numerous grounds specified in their motion to dismiss, defendant set forth in paragraph 16 thereof that plaintiff's suit is barred by the five-year Statute of Limitations. The trial court held that this ground was well taken, dismissed the complaint and entered judgment accordingly. Since plaintiffs concede that the final judgment of general dismissal must be affirmed if any one of the several grounds specified, is well taken, we consider it unnecessary to discuss the numerous other objections urged as to the sufficiency of the complaint, since in the view we take the court properly sustained the motion to dismiss on the ground that suit was barred because it was not commenced within five years from the date the alleged cause of action arose.

Because it appears upon the face of the complaint that the alleged claims sought to be stated are barred by lapse of time, plaintiffs charge by general averments an absence of notice or knowledge on their part of the matters or things alleged in their pleading which occurred during this seventeen-year period since 1926, and that none of the alleged matters came to their attention until July 1943, approximately two months before they commenced suit.

The bar of the Statute of Limitations is pleaded in paragraphs 16 and 17 of the motion to dismiss. These paragraphs aver that it appears from the face of the complaint that the cause of action, if any, accrued more than five years preceding the commencement of suit, and that plaintiffs were advised or had knowledge or notice of, or were put upon inquiry with respect to, the various matters and things charged or attempted to be stated in plaintiff's pleading. The authorities are fairly in accord that in this class of cases the party seeking to avoid the bar of the Statute of Limitations is held to stringent rules of pleading. These principles are well stated in the leading

case of Wood v. Carpenter, 101 U.S. 135, cited, discussed and quoted with approval in Keithley v. Mutual Life Insurance Co., 271 Ill. 584. In Wood v. Carpenter, the court had before it a pleading involving purported fraudulent acts, representations and concealments with respect to the sale by plaintiff of a judgment, and as in the case at bar it was alleged that defendant, to deceive plaintiff, negotiated the purchase through a "dummy." It was also charged, as in the case at bar, that the secret transaction was consummated for the purpose of concealing the alleged cause of action from plaintiff. The trial court sustained a demurrer to a replication to a plea of the Statute of Limitations, and in holding that the averments of the pleading respecting alleged concealment of plaintiff's cause of action and of the facts upon which it was based, were not sufficient to take the case out of the Statute of Limitations and bring it within a statutory exception similar to section 22 of the Illinois act, laid down the fundamental principles of pleadings applicable in such cases which are pertinent to the question here involved. The Supreme Court first pointed out that statutes of limitations are vital to the welfare of society and are favored in law; that "they are found and approved in all systems of enlightened jurisprudence"; that "they promote repose by giving security and stability to human affairs"; that "they stimulate to activity and punish negligence"; that "while time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary"; and that "mere delay, extending to the limit prescribed, is itself a conclusive bar." The court then pointed out that a party seeking to avoid the statute must be held to stringent rules of pleading, and quoting from Stearns v. Page, 7 How. 819, added that "especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation

was discovered, and what the discovery is ***,'" and then went on to say that "a general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner." The court affirmed the rule that the burden is on plaintiff to present a proper pleading, and quoted with approval from Wynne et al. v. Cornelison et al., 52 Ind. 312, as follows: "The Statute of Limitations is a statute of repose, and where its operation is sought to be avoided by the party liable to the action, the allegation and proof should bring the case clearly within the section. The allegation that the defendants pretended and professed to the world that the transactions were bona fide transactions, is too general to amount to any thing.'" The court concluded with the observation that "There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence."

Without pointing out specifically the insufficiency of the complaint in the case at bar, we have concluded after a careful examination of the pleadings, which are too lengthy to be set forth in detail within the reasonable confines of this opinion, that the complaint is vulnerable to most of the foregoing rules, principles and conclusions. It lacks entirely any averments of fact as to the circumstances which attended the discovery of the matters of which plaintiffs at this late date complain. For instance, it is not alleged that any representations were made to plaintiffs other than on the date they sold the certificate, September 26, 1933, and no explanation is made as to why, during the seven preceding years when the alleged

grievous wrongs, charged in some ten paragraphs of the complaint, are asserted to have taken place, no inquiries of any kind were made by plaintiffs. It is not alleged that they were concealed at any time during that seven-year period. It is not alleged that plaintiffs at any time made any inquiries of the titleholding trustee or that such inquiries, if made, would have been unavailing. In view of plaintiffs' original connection with the venture and of the character of the project, it is inconceivable that they should have slept on their rights for seventeen years, or that they were wholly or completely ignorant of the matters alleged or of the affairs and progress, or lack thereof, of the business. The means of discovery were clearly at hand, and plaintiffs make no allegations showing that they pursued the avenues open to them which would have disclosed any of the facts of which they complain.

Plaintiffs' suit was commenced September 16, 1943, only a few days short of ten years after they sold their certificate. The matters and things of which they complain are stated to have taken place some time between February 15, 1926, the date the subdivision land trust was created, and September 26, 1933, the date of sale. The allegations repeated throughout the complaint that plaintiffs had no notice or knowledge of the matters charged until July 1943, are in the nature of general averments of want of knowledge or notice, and under the authorities are insufficient to toll the statute. Wood v. Carpenter, supra; Jackson v. Anderson, 355 Ill. 550; Keithley v. Mutual Life Insurance Co., supra; Parmelee v. Price, 208 Ill. 544.

In an effort to cure these defects of the complaint plaintiffs seek to bring their case within section 22 of the Limitations Act which provides that "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at

any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards"; and they allege that on and prior to the date of sale defendant concealed the "matters" alleged by falsely representing "that none of said facts and matters stated" in paragraphs 7 to 15 inclusive "or any of them was true or existent," and they charge, inter alia, that they were led by McCormack's false representations to believe that they were selling their certificate either to him, his company, or to Western Realty Development Company, which is alleged to have been organized by Chicago Title and Trust Company for the purpose of acquiring these certificates. Plaintiffs do not allege that they made any inquiry as to what Western Realty Development Company was, or how or why it had become interested in the purchase of certificates or what connection McCormack had with it; nor do they allege that any inquiry was made as to whether McCormack was negotiating for the purchase of other certificates, and if so, why, and what his intentions were. Neither is it alleged that the identity of the purchaser played any part in the decision of plaintiffs to sell their certificate. It is fair to presume from the allegations of the complaint that if plaintiffs were willing to sell to the active trust manager or his company, they would have been equally willing to sell to the titleholding trustee, and there being no allegation as to any relation of cause and effect between the identity of the purchaser and the sale of the certificate, the general allegations of the complaint respecting the identity of the purchaser and the organization of the Western Realty Development Company are irrelevant and immaterial to any issue presented.

Nor does it appear that the allegations respecting the alleged representations made by McCormack were such as to lull

plaintiffs into a sense of security or to dissuade them from investigation; on the contrary, they were calculated to have the opposite effect. The complaint alleges that McCormack represented that no audit had been made, and that none of the matters appearing in the audit and report and none of the matters alleged in the complaint, were true or existent. Such representations would have put the average person to immediate and vigorous inquiry. As was said in Jackson v. Buchanan, 59 Ind. 390, which is quoted with approval in Short v. Estate of Jacobus, 212 Ill. App. 77, "That the guilty parties should deny the act averred in the complaint, is not calculated to conceal the fact, but rather to awaken the attention of the aggrieved party to its existence, and put him upon enquiry as to its truth; nor does it tend to avoid enquiry concerning it, but rather to invite it."

Lastly, it is not alleged that plaintiffs were influenced by any fiduciary relations or that they reposed any trust or confidence at the time of the sale which led them to do something they would not otherwise have done or which induced them to refrain from pursuing any course. For aught that appears in the complaint, they willingly sold their certificate to the trust manager.

With respect to the lapse of time, it is plaintiffs' principal contention that the Statute of Limitations, if otherwise applicable, was tolled by the affirmative fraudulent acts of the defendant, designed for and resulting in the concealment of the cause of action from the plaintiffs, and their counsel argues that the complaint makes out a case of affirmative fraudulent acts of the defendant designed for and resulting in such concealment. As a basis for this contention plaintiffs rely on the general averments of paragraphs 16 and 17 of the complaint.

Paragraph 16 alleges that neither of the plaintiffs had any knowledge or notice of any of the facts or matters alleged in paragraphs 7 to 15, inclusive, "nor of the fact that they had any cause of action against the defendant, until a date less than five years preceding the commencement of this suit, *** and during all of that period the defendant wilfully and fraudulently prevented the plaintiffs from acquiring such knowledge or notice by the fraudulent concealments and representations hereinbefore set forth and also by the further fraudulent conduct hereinafter described. And the defendant, for the deliberate and fraudulent purpose of concealing from the plaintiffs all notice and knowledge of said matters, and for the further deliberate and fraudulent purpose of concealing from the plaintiffs all knowledge of the cause of action stated in this complaint, or of any cause of action against the said defendant, fraudulently conspired with the said McCormack to withhold and conceal all of said knowledge and notice from the plaintiffs, and, for the purpose of such concealment, further fraudulently conspired with said McCormack to organize and operate a certain corporation, to-wit, the Western Realty Development Company for the purpose of having said corporation be the ostensible purchaser of said Participation Certificate," and it is alleged that "in furtherance of said conspiracy" defendant, under date of September 15, 1933, secretly entered into a written agreement with McCormack and proceeded secretly to execute and carry out the provisions of that agreement for the purpose of concealing from plaintiffs the facts alleged in the complaint, "including the fact that these plaintiffs had any cause of action against the defendant." It is further alleged in paragraph 16 that as a part of "said conspiracy" defendant organized the Western Realty Development Company and subscribed to and retained all the stock

thereof, designated and selected its own agents as directors, who were at all times under the sole and exclusive control and direction of defendant, and that "pursuant to said conspiracy, and through and by said corporation and its ostensible agents solely controlled and directed by the defendant, and through and by said McCormack and a corporation named J. W. McCormack Company, Inc., all as the agents of the defendant, the said defendant falsely represented to the plaintiffs and induced the plaintiffs to believe, and plaintiffs did then believe, that one or more of said corporations and individuals, not including the defendant, was the negotiator and purchaser in said sale of said Participation Certificate No. 61 as aforesaid by the plaintiffs."

In paragraph 17 plaintiffs allege that for the further purpose of concealing the cause of action from their knowledge, defendant, after the sale of the participation certificate, caused it to be assigned to the Western Realty Development Company and to remain "in the ostensible 'ownership'" of that corporation, and out of defendant's own funds supplied the Western Realty Development Company with funds with which to purchase and to deal with said certificate, and thereafter caused the development company to direct the defendant to close the trust and transfer the assets thereof to the development company, "and did further cause said Western Realty Development Company thereafter to pledge said assets to the defendant for a purported loan of \$161,854.84 to said Western Realty Development Company, when in truth and in fact" that company was "a mere creature and agent of the defendant doing no business other than the accomplishment of said conspiracy and having no assets other than the assets to it transferred by the defendant for the sole purposes of said conspiracy and having no directors, officers or agents other than

the agents selected and employed by the defendant as its own agents for the accomplishment of said conspiracy, and having no stockholders other than the defendant."

None of these allegations meet the requirements of pleading set forth in Wood v. Carpenter, nor do the averments of these two paragraphs make out a case within section 22 of the Statute of Limitations. Keithley v. Mutual Life Insurance Co., 271 Ill. 584, Jackson v. Anderson, 355 Ill. 550, Skrodzki v. Sherman State Bank, 348 Ill. 403, McNeil v. Bulkley, 269 Ill. App. 1, People ex rel. Nelson v. Union Bank of Chicago, 308 Ill. App. 411, and Trustees of Schools v. American Surety Co., 307 Ill. App. 398, are generally to the effect that the fraudulent concealment of a cause of action which will prevent the running of the Statute of Limitations within the meaning of section 22 must be some affirmative act or representation intended to prevent the discovery of the cause of action, and which does actually prevent such discovery. They hold that the pleading setting forth such fraudulent concealments must set up affirmatively the facts constituting the concealment and not mere conclusions of the pleader. As we read the amended complaint, and especially paragraphs 16 and 17 thereof, it does not allege any fact showing affirmative action by the defendant communicated to the plaintiffs either at the date of sale or thereafter, which served to conceal from them any cause of action upon which they now seek to recover. Nothing is alleged in these paragraphs which consists of affirmative acts directed to and which affected the plaintiffs or of which they had knowledge or which came to their attention. Moreover, even without knowledge of the matters alleged in paragraphs 16 and 17, the representations made to plaintiffs as to impending foreclosure should have had the tendency to put them on inquiry and to challenge their attention to matters which should be in-

investigated in connection with the sale of their certificate. The cases cited further hold that the fraudulent representations which allegedly form the basis of the cause of action do not constitute fraudulent concealment within the meaning of section 22 in the absence of allegations or acts of representation tending fraudulently to conceal the cause of action. The rule is well stated in Keithley v. Mutual Life Insurance Co. as follows: "The doctrine announced in these decisions is, that the fraudulent concealment of a cause of action which will prevent the running of the Statute of Limitations must be some affirmative act or representation intended to prevent the discovery of the cause of action, which does actually prevent such discovery; that a replication setting up such fraudulent concealment must set out the facts constituting the concealment; that the fraudulent misrepresentations which form the basis of the cause of action do not constitute a fraudulent concealment in the absence of allegations of acts or representations tending fraudulently to conceal the cause of action." The rule enunciated in this and the other decisions cited is again affirmatively stated in Skrodzki v. Sherman State Bank, where it is said: "It was there [Keithley v. Mutual Life Insurance Co.] also held that fraudulent misrepresentations which form the basis of the cause of action do not constitute a fraudulent concealment in the absence of proof of acts or representations tending fraudulently to conceal the cause of action, and that the rule that the statute begins to run only from the discovery of the fraud does not apply when the party affected by the fraud might with ordinary diligence have discovered it."

The remaining consideration with respect to the Statute of Limitations is whether the ten-year period, rather than the five-year period, applies. Inasmuch as the complaint was filed

ten days before the expiration of the ten-year period following the sale of the certificate, plaintiffs argue that their suit is founded on a written instrument, and therefore the ten-year period applies. The written instrument referred to is the trust agreement. This is apparently an afterthought. Except for general allegations in plaintiffs' complaint respecting alleged duties of the trustee, neither the trust agreement as a whole nor any part thereof is pleaded, described, alleged or referred to in the complaint, and it was not even attached to the original pleading. The trust agreement was in all essential respects in the form of the usual subdivision land trust, under which joint venturers, by pooling their resources, assembled a block or blocks of real estate which is conveyed to a titleholding trustee, for the purpose of subdividing, developing and selling the same for profit. The titleholding trustee receives comparatively nominal compensation for accepting the trust and taking and holding title to the land. There is nothing in the trust agreement which would justify the conclusion from any allegations made in the complaint that plaintiffs were deceived by any fraudulent representations in the agreement, to part with their certificate for less than it was worth. Their suit is predicated upon fraudulent representations alleged to have been made by McCormack and by the alleged withholding of information as to the value of their certificate.

For the reasons indicated, we are of the opinion that the chancellor properly sustained defendant's motion to dismiss the amended complaint, as amended, upon the sole ground of the Statute of Limitations, and therefore the decree or order of the Circuit Court is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

43647

CHRIST SELIMOS,

Appellee,

v.

HARRY CHRIST, JULIA CHRIST,
JOHN KASOTAKIS and CHRIS
D. TOULON,

Appellants.

213
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

331 I.A. 412

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in tort against defendants, alleging that by means of a fraudulent scheme or device they conspired to induce him to accept and give satisfaction of a judgment held by him against the defendant Harry Christ, for an amount less than was due plaintiff. The jury returned verdicts finding the defendants Toulon, Kasotakis and Harry Christ guilty and assessed plaintiff's damages against them in the sums of \$2000, \$1000 and \$442.75, respectively. The defendant Julia Christ was found not guilty. Motions of defendants for judgment notwithstanding the verdict, and in the alternative for a new trial, were overruled, and the judgment from which defendants appeal was accordingly entered.

The facts essential to a consideration of the issues involved may be summarized as follows. On August 7, 1935 plaintiff obtained a judgment for \$267 against the defendant Harry Christ. On November 1, 1941, more than six years later, an execution was issued and returned unsatisfied.

The defendant Toulon is an attorney at law, having been admitted to the bar in 1936. He had known the defendant Harry Christ for five or six years prior to November 1, 1941. About that time Christ told Toulon he was borrowing some money and requested him to prepare a chattel mortgage and note. Toulon then proceeded to take an inventory of Christ's place of busi-

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ness, prepared the chattel mortgage and note at his office, and returned to Christ's place of business, where the note and mortgage were signed November 12, 1941. The defendant Kasotakis was present at the time and gave Christ a cashier's check for \$1500, being the amount of the note and mortgage; the check was cashed the same day, and the canceled check was introduced in evidence upon trial. Kasotakis had a cigar and soft-drink concession at 2316 South Cicero avenue, a few doors north of Christ's place of business. It appears that at the time Kasotakis made the loan of \$1500 to Christ, he had known him for about seven years. At Kasotakis' request Toulon had the chattel mortgage recorded. Christ testified that he borrowed the \$1500 because he wanted to buy some property. There is evidence tending to show that Christ intended to buy a two-story frame building, but the transaction was never consummated, and accordingly he paid back the money which he had borrowed, \$160 in four equal payments between November 15, 1941 and February 15, 1942, and the remainder of \$1340 on March 8, 1942, and Toulon, at Christ's request, prepared a release of the chattel mortgage.

The evidence discloses that at the time the mortgage was drawn and recorded, Toulon knew of the existence of the judgment against Christ. On January 5, 1942 an execution was issued out of the Circuit Court of Cook County on plaintiff's judgment for \$267 plus \$12.50 costs, and endorsed on the execution is a return by the sheriff that he served the same on defendant January 12, 1942.

The defendant Toulon prepared for Christ a debtor's schedule which was filed January 15, 1942, scheduling chattels and merchandise in Christ's store at 2332 South Cicero avenue, valued at about \$700, and also a 1938 four-door Nash sedan valued at

\$300, all of which were said to be subject to the chattel mortgage of \$1500, with an exemption of \$400 claimed by Christ as a married man.

A few days prior to March 11, 1942, plaintiff's counsel had a telephone conversation with Toulon in which he offered to accept \$350 in full settlement of the judgment and costs. Toulon advised him that he thought this was too much and made a counteroffer of \$300, whereupon plaintiff's counsel stated that he would submit this figure to his client and let Toulon have an answer later. On the evening of March 11, 1942 Toulon received a call from Christ to come to his place of business, and upon his arrival he found plaintiff, his attorney and a constable present. Upon inquiry as to what was going on, plaintiff's attorney advised Toulon that he was making a levy. Toulon protested because plaintiff's attorney had promised to let him have an answer as to the settlement offer submitted by Toulon. Thereupon an altercation ensued, and after some conversation Christ paid \$175 and received the following receipt: "Received of Harry Christ, One Hundred Seventy-five (\$175.00) dollars, on account, to apply on the judgment in the case of Christ Selimos vs. Harry Christ, Case No. 153, before Judge Roy F. Nix, of River Forest, Illinois. Balance of \$175.00, which amount will include all costs of judgment to be paid in cash on or before March 13th, 1942, at the office of Peter Sarelak, Attorney for Christ Selimos. *** It is understood and agreed that the levy will be stayed until March 14, 1942." The following day an additional \$175 was paid, and another receipt was issued, as follows: "Received of Harry Christ, One Hundred Seventy Five (\$175.00) dollars, balance, payment in full to apply on the judgment in the case of Christ Selimos vs. Harry Christ, Case No. 153, before Judge Roy F. Nix, en-

\$300, all of which were said to be subject to the stated mortgage of \$1500, with an exception of \$400 claimed by Christ as a married man.

A few days prior to March 11, 1942, Plaintiff

counsel had a telephone conversation with Toulon in which

he offered to accept \$250 in full settlement of the judgment

and costs. Toulon advised him that he thought this was too much

and made a counteroffer of \$250, whereupon Plaintiff's counsel

stated that he would submit this figure to his client and let

Toulon have an answer later. On the evening of March 11, 1942

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Toulon protested because Plaintiff's attorney had promised to

let him have an answer as to the settlement offer submitted by

Toulon. Thereupon an execution issued, and after some con-

versation Christ paid \$175 and received the following receipt:

"Received of Harry Christ, One Hundred Twenty-five (\$125.00)

dollars, on account, to apply on the judgment in the case of

Christ Selmos vs. Harry Christ, Case No. 173, before Judge

Foy F. Nix, of River Forest, Illinois. Balance of \$275.00,

which amount will include all costs of judgment to be paid in

cash on or before March 15th, 1942, at the office of Peter

Sarles, attorney for Christ Selmos. *** It is understood

and agreed that the levy will be stayed until March 14, 1942."

The following day an additional \$175 was paid, and another

receipt was issued, as follows: "Received of Harry Christ,

One Hundred Twenty Five (\$175.00) dollars, balance, payment

in full to apply on the judgment in the case of Christ Selmos

vs. Harry Christ, Case No. 173, before Judge Foy F. Nix, on-

tered on August 7, 1935." Plaintiff accepted the \$350 in full satisfaction of the judgment and costs, and evidently made no claim for any further sums. In his suit as subsequently brought, he asked for punitive damages, on the theory that he had been put to considerable expense in collecting his judgment from Christ.

Among the grounds for reversal it is urged (1) that the verdict is against the manifest weight of the evidence; (2) that exemplary damages are not subject to be awarded where no actual damages have been sustained; (3) that the damages awarded were grossly excessive and that the jury were motivated by passion or prejudice; (4) that the court erred in the giving of numerous instructions; and (5) that where a joint conspiracy or fraudulent misconduct is charged, all the parties are liable for the damages sustained, and the liability may not be apportioned.

Because this case will in all probability have to be retried, we deem it unnecessary to recite in detail the evidence adduced upon the hearing, or to discuss all the propositions urged for reversal. The basic fact is undisputed that plaintiff had judgment against Christ for \$267 in 1935, and that for six years plaintiff apparently made little or no effort to collect; that when, in March 1942, he proceeded to make a levy under an execution issued several months prior thereto, plaintiff accepted from the judgment debtor the sum of \$350 in full satisfaction of the judgment for \$267, and after delivering receipts evidencing the acceptance of monies in full payment of his judgment, he brought this suit, claiming exemplary damages. Plaintiff testified that "I am asking the jury to give me \$442.75, plus exemplary damages." It is significant that he also testified that his attorney figured out the amount

dated on August 7, 1937. Plaintiff accepted the \$250 in full satisfaction of the judgment and costs, and evidently made no claim for any further sums. In this case as substantially brought, he asked for punitive damages, on the theory that he had been put to considerable expense in enforcing his judgment from Christ.

Among the grounds for reversal it is urged (1) that the verdict is against the weight of the evidence; (2) that exemplary damages were not allowed in a case where no actual damages have been established; (3) that the damages awarded were grossly excessive and that the jury was misled by passion or prejudice; (4) that the court erred in the giving of numerous instructions; and (5) that there is a joint conspiracy or fraudulent misconduct as to which the plaintiff is entitled for the damages sustained, and the defendant is not so entitled.

Because this case will in all probability have to be retried, we deem it unnecessary to write in detail the evidence adduced upon the hearing, or to discuss all the propositions urged for reversal. The basis for the undisputed fact plaintiff had judgment against Christ for \$250 in 1937, and that for six years plaintiff apparently made efforts to collect; that when, in March 1943, he proceeded to make a levy under an execution issued several months prior thereto, plaintiff accepted from the judgment debtor the sum of \$250 in full satisfaction of the judgment for \$250, and after delivering receipts evidencing the acceptance of monies in full payment of his judgment, he brought this suit, claiming exemplary damages. Plaintiff testified that "I am asking the jury to give me \$442.75, plus exemplary damages." It is significant

due, including interest, and computed the figure at \$442.75. The jury awarded plaintiff sums aggregating \$3442.75, a total almost eight times the amount of the loss alleged to have been sustained by him. Courts of review in various jurisdictions have generally held that the imposition of heavy exemplary damages, where the actual damages are small, is a circumstance which ought to be carefully scrutinized in order to determine whether passion rather than reason dictated the verdict, and it has been held that the award should not be disproportionate to the actual damages sustained. Cotton v. Cooper, 209 S.W. 135 (Tex. Com. App.); Tynberg v. Cohen, 76 Tex. 409, 13 S.W. 315; Falkenberg v. Neff, 72 Utah 258, 269 Pac. 1008; and Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 Pac. 255. We think the exemplary damages are out of all proportion to the amount of loss alleged to have been sustained by plaintiff, and upon that ground alone the judgment should be reversed and the cause remanded.

Moreover, an examination of the various instructions given indicates that serious error was committed. For instance, in instruction No. 2 the court gave a lengthy abstract definition of fraud, without indicating in any way its application to the facts in issue. Such an instruction was held prejudicial in Burke v. Zwick, 299 Ill. App. 558. In the case of People v. Isbell, 363 Ill. 264, the court characterized an instruction there given as an abstract statement of law, and said that "Instructions should not only be applicable to the facts in evidence, but they should make application of the law they purport to state, to the facts." In the case at bar the jury were invited by the instructions given, without any reference to the facts in the case before them, to give consideration to a generalized, argumentative, lengthy definition of fraud, which could not have

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Burge v. Tupper, 299 Ill. 34, 35. In the case of People v.
tests in issue, and an instruction which would preclude the
of fraud, without indicating in any way its application to the
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Moreover, an examination of the various instructions give
and the court remarked,
this, and upon that ground alone the instruction should be reversed
to the amount of loss alleged to have been sustained by plain-
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Rec. 100; and 101 Ill. 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The jury awarded plaintiff as a percentage of 100%, a total
due, including interest, and so stated at 100%.

almost eight times the amount of the loss alleged to have
been sustained by him. For the reasons in various jurisdic-
tions have generally held that the allocation of heavy oner-
ous damages, where the actual damages are small, is a dis-
crimination which can be shown to be an unfair result in order to
determine whether justice and equity require that the ver-
dict, and it has been held that the award should not be dis-

proportionate to the actual damages sustained. Johnson v.
Coppage, 209 U.S. 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

been helpful to the jury because it had no application to the facts. In instruction No. 3 the jury were told that "The charge against the defendants being one of fraud, ought not to be lightly inferred; still, it need not be proved by direct or positive evidence. If that were the case, frauds could scarcely ever be proved." This latter sentence was undoubtedly taken from an opinion, and such method of instructing a jury has been criticized as improper. See Lisansky v. United States, 31 Fed. (2d) 846, and Village of Fairbury v. Rogers, 98 Ill. 554. The court's charge to the jury is subject to the further criticism that in instructions numbered 4, 6 and 7 plaintiff's right of recovery was unduly emphasized, and an excessive number of instructions were given as to plaintiff's right to recover exemplary damages, at least three of the instructions having dealt with this subject matter. The constant repetition of this theme could hardly have had any other effect upon a jury than to impress upon them the inference that if they found for the plaintiff, the court expected them to assess exemplary damages. We assume that upon retrial the vice of these instructions will not be repeated, and therefore do not deal with them in any great detail here, but we are satisfied from an examination of many of the instructions given that they were highly prejudicial.

Lastly it is urged by defendants that where a joint conspiracy or fraudulent misconduct is charged, all the parties are liable for the damages sustained, and the liability may not be apportioned. The jury in their verdict assessed liability against the defendants in various amounts, and it is thus apparent that they attempted to apportion the liability in various amounts against the several defendants. Plaintiff seeks to justify these verdicts by relying on section 50 of the Civil Practice Act, claiming that under that section of

the statute separate verdicts and judgments against the defendants are authorized and proper. We think, however, that plaintiff's cause of action against defendants was not a separate controversy such as the Practice Act contemplates, but arose out of an alleged indivisible conspiracy, and therefore all defendants who were made parties and found guilty, necessarily were liable for the full amount of damages, if any, sustained by plaintiff. Shaw v. Courtney, 317 Ill. App. 422, deals with an interpretation of section 50 of the Practice Act, and quotes with approval from McCaskill's Annotations to the Civil Practice Act, and from observations of Professor Hinton of the University of Chicago (Harrow's Illinois Practice Manual), both of whom aided in the drafting of that statute and thereafter materially assisted in the interpretation thereof. From these commentaries it appears that this section does not alter the form of judgment that will be rendered against defendants jointly liable. In the recent case of Reiter v. Illinois National Casualty Co., 328 Ill. App. 234, which was decided since the filing of the original briefs herein, the court said that "Every conspirator is liable for all of the acts of each of his co-conspirators committed before or after his entry into the conspiracy. *** Each party to the conspiracy is liable for all of plaintiff's damages, even though some of them may not have profited by the illegal acts," and in support of this statement the court cited, among other authorities, 11 Am. Jur., Conspiracy, sec. 48, where it is said: "The connection between parties having been established, whatever was done in pursuance of the conspiracy by one of the conspirators is considered as the act of all the conspirators; all are equally liable therefor as joint tort-feasors, ***."

For the reasons indicated we are of opinion that the

the statute requires verdicts and judgments against the defendants and authorized and proper. The statute, however, does not require a finding of action against defendants who are not a party to the conspiracy, but as the statute for conspiracy, it also says that each of the alleged individual conspirators, and therefore all defendants who were party to the conspiracy, are necessarily jointly liable for the full amount of damages, if any, sustained by plaintiff. *Illinois National Conspirators, 337 Ill. App. 432*, deals with an interpretation of section 10 of the statute and quotes with approval from *Illinois National Conspirators* to the effect that, as from observations of Professor Hinton of the University of Chicago (Hinton's Illinois Practice (1941)), both a joint and a several liability is required in the statute and therefore necessarily included in the interpretation thereof. From these comments it appears that this action does not alter the form of judgment that will be rendered. *Illinois National Conspirators*, 337 Ill. App. 432, in the *Illinois National Conspirators*, 337 Ill. App. 432, which was decided since the filing of the original writs herein, the court said that "Every conspirator is liable for all of the acts of each of his co-conspirators committed before or after his entry into the conspiracy, and each party to the conspiracy is liable for all of plaintiff's damages, even though some of them may not have profited by the illegal acts," and in support of this statement the court cited, among other authorities, *Ill. Ann. Stat., Conspiracy, sec. 43*, where it is said: "The connection between parties having been established, whatever was done in pursuance of the conspiracy by one of the conspirators is considered as the act of all the conspirators; all are equally liable therefor as joint tort-feasors, etc."

For the reasons indicated we are of opinion that the

case should be retried, and accordingly the judgment of the Superior Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Scanlan, J., concur.

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and to the other side of the road. The road is very narrow and the traffic is very heavy. The road is very old and the traffic is very heavy. The road is very old and the traffic is very heavy.

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The road is very old and the traffic is very heavy. The road is very old and the traffic is very heavy. The road is very old and the traffic is very heavy.

The road is very old and the traffic is very heavy. The road is very old and the traffic is very heavy. The road is very old and the traffic is very heavy.

43665

MARY ANN KUEHN,
Appellee,

v.

NICHOLAS H. KUEHN, JR.,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

331 I.A. 412²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, Mary Ann Kuehn, obtained a decree for separate maintenance which fixed the amount necessary for her support, awarded her the care, custody and control of two minor children, and dismissed for want of equity defendant's counterclaim for divorce. The cause was heard upon oral testimony adduced in court and a stipulation of the parties that the chancellor should read and consider evidence taken by the master pursuant to a reference and reported without any conclusion as to the facts. Since, on appeal, "defendant *** waives all claim for a divorce from the plaintiff, and hereby consents that this Appellate Court may affirm that part of the decree of the trial court which dismissed the defendant's counterclaim for want of equity," the only questions presented are those relating to the decree for separate maintenance and the custody of the children.

The parties were married in Chicago on November 30, 1940, and at the time these proceedings were instituted two children, Nicholas, aged four, and Mary Ann, aged one, had been born of said marriage. Defendant is a graduate of Illinois and Massachusetts Institutes of Technology, and was employed by the City of Chicago as a sanitary engineer. Plaintiff is a graduate of St. Xavier College, Chicago. Shortly after their marriage they took up residence at 11237 Eggleston avenue in Chicago, where they lived together until their separation. This home consisted of five rooms, a closed-in porch, a basement and a large yard.

MARY ANN KUTNER
Appellee

NICHOLAS H. KUTNER, JR.
Appellant

MR. JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

The plaintiff, Mary Ann Kutner, obtained a decree for separate maintenance which fixed the amount necessary for her support, awarded her the care, custody and control of two minor children, and decreed for want of equity defendant's contribution for support. The court also made an oral testimony taken in court and a stipulation of the parties that the same should stand and consider evidence taken by the master pursuant to the decree and entered without any conclusion as to the facts, issues, or equities, defendant *** waives all claim for a divorce from the plaintiff, and hereby consents that this decree be entered. It is that part of the decree of the trial court which dissolved the defendant's contribution for want of equity, the only question presented are those relating to the decree for separate maintenance and the custody of the children.

The parties were married in 1940 or 1941, and at the time these proceedings were instituted two children, Nicholas, aged four, and Mary Ann, aged one, had been born of said marriage. Defendant is a graduate of Illinois and Massachusetts Institutes of Technology, and was employed by the City of Chicago as a sanitary engineer. Plaintiff is a graduate of St. Xavier College, Chicago. Shortly after their marriage they took up residence at 1127 Eggleston Avenue in Chicago, where they lived together until their separation. This home consisted of five rooms, a closed-in porch, a basement and a large yard.

In the spring of 1943 plaintiff suffered a nervous breakdown, and after a conference between defendant and members of plaintiff's family, she was taken by defendant to Sacred Heart Sanitarium at Milwaukee, Wisconsin, about the middle of June 1943, for care and treatment. She remained there until early in September of that year, a period of about twelve weeks, and then returned to their home, where she resumed her household duties and the care of their son. While at Sacred Heart Sanitarium she learned for the first time that she was pregnant with her second child.

In November of 1944 plaintiff again became ill. Defendant was concerned about her mental condition and took her to Dr. R. P. Mackay of St. Luke's Hospital in Chicago for a medical examination. As the result of a conference following her examination by Dr. Mackay, who found her to be mentally ill, defendant took steps to procure her admission to the Psychopathic Hospital of Cook County, which she entered on Thursday, November 16. After an examination there she was allowed to leave the following Saturday, and returned again on Tuesday, November 21, for further examination. That night she stayed at her mother's home and returned to the Psychopathic Hospital on the next day to attend a hearing of her case by the County Court. As the result of an inquest she was adjudged to be of unsound mind, dangerous to herself and others if permitted to go at large, and declared to be a person requiring care and treatment in a hospital for mentally ill persons. By order of court she was committed to the Department of Public Welfare and to her mother, Mrs. Edward Haggerty. Members of her family, as well as her attorney, were present at the hearing. The presiding judge then asked defendant about his financial status, and was informed that he was not then in a position to bear the expense of treatment

in the spring of 1943, plaintiff suffered a nervous breakdown, and after a confinement in a hospital and several months of treatment at the hospital, plaintiff returned to her home in the fall of 1943, for care and treatment. The next day, plaintiff was taken to the hospital, where she remained for several months, and then returned to her home, where she remained for several months and the care of her son. This is a true and correct statement of the facts and the care of her son. At the first time that she was brought with her second child, plaintiff, in November of 1944, plaintiff was ill. Plaintiff was concerned about her mental condition and took her to Dr. E. J. Mackay of St. Louis, who is a physician in St. Louis for a mental examination. As the result of a conference following her examination by Dr. Mackay, the County was to be mentally ill, defendant took steps to procure for plaintiff to the Psychopathic Hospital of St. Louis, which she entered on Thursday, November 15, 1944. After an examination the same day, she was taken to leave the following Saturday, and returned again on Monday, November 19, for further examination. That night she stayed at her mother's home and returned to the Psychopathic Hospital on the next day to attend a hearing of her case by the County Court. As the result of an expert she was adjudged to be of unsound mind, dangerous to herself and others, and committed to the County Jail, and declared to be a person requiring care and treatment in a hospital for mentally ill persons. By order of court she was committed to the Department of Public Welfare and to her mother, Mrs. Edward Hegarty. Members of her family, as well as her attorney, were present at the hearing. The presiding judge then asked defendant about his financial status, and was informed that he was not then in a position to bear the expense of treatment

and care for her in a private institution. Her mother's family, however, obtained permission to place her in Mercyville Sanitarium at Aurora, Illinois, at their own expense. She remained there for about six and one-half weeks, undergoing electric-shock treatments, and on January 7, 1945 was discharged as recovered. On that day, accompanied by her sister, she proceeded to her mother's home at 1509 East 63rd place in Chicago. Three days later, on January 10, 1945, an order was entered in the County Court of Cook County adjudging that she had recovered from her mental illness and was competent to manage her business, personal and civil affairs without endangering herself or others, and ordering that her civil rights be restored to her. Defendant contends that he did not know of her discharge from Mercyville and her return to Chicago and that he had no notice of the proceedings for the entry of this order until informed thereof in a telephone conversation with plaintiff on the day it was entered.

After plaintiff was released from Mercyville on Sunday, January 7, she arrived at her mother's home about ten o'clock that evening. The following day she called defendant at his office to inform him that she had returned home. Defendant told her he could not talk to her at that particular time and would call later. Before calling defendant she had been advised by her attorney that in order to be restored it was necessary to obtain certificates from two physicians in addition to the certificate of dismissal from Mercyville, and accordingly she had made appointments with Drs. Samuel Russell and Frederick Bennett for the evening of January 8, and in keeping these appointments she was absent from her mother's home until about 10:30 that evening. Defendant telephoned the Haggerty home about 7:00 P. M. but plaintiff was not then in. He said he would call later but did not do so. Her attorney took care of the restoration proceed-

ings, and the order was entered on January 10. She then called defendant on January 11 to inform him that the restoration order had been entered, and her attorney also advised defendant by telephone that plaintiff's civil and personal rights and liberties had been restored. At defendant's request a certified copy of the restoration order was mailed to him, and he turned this over to his attorney. There was no further communication between the parties until February 1, at which time they met at the office of Mr. Frank Leviton, an attorney representing the defendant. Both parties and their respective counsel were present at this meeting. There defendant insisted that as a condition precedent to their resuming living together, she submit to examination by three psychiatrists, two of whom were to be selected by him. After considerable conversation it was agreed that if plaintiff would consent to be examined by Drs. Mackay, Lichtenstein and Foley and if after such examination these three psychiatrists pronounced her mentally sound, she might then take charge of her household and assume the care of her children, but after the lapse of two days plaintiff reconsidered the matter and refused to consent to such an examination, and the separate maintenance proceedings were filed February 9, 1945. During the pendency of this cause plaintiff was examined by two recognized psychiatrists, Dr. Ben W. Lichtenstein, on February 15, 1945, and Dr. William H. Haines, on April 3, 1945. In addition to these psychiatrists she had also been examined by Dr. Frederick Bennett, who attended her at the time of the delivery of her children and was familiar with the state of her health and mind, and Drs. Vernon L. Evans and Samuel Russell. Dr. Russell had been the Haggerty family physician for many years, and previously had been connected with the Cook County Hospital in the psychiatric section. All these physicians and psychiatrists were of the opinion that she was mentally sound at the time they examined her, but defendant was

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evidently so obsessed with his idea about her unsound mental condition that he would not accept the decision of any doctor whose opinion did not conform to his own, and the findings of these five physicians who pronounced her mentally sound, did not satisfy him. His objections to her returning to the family home were based on suicidal ^{and homicidal} fears. He charges that on several occasions his wife threatened to take her own life as well as that of the children. There is scant evidence to support these charges, but if any such tendency existed it antedated her treatment at Mercyville. Her treatment there restored her mentally, and the subsequent psychiatric examinations and order of restoration by the County Court should have dissipated any obsessions or fears which defendant entertained thereafter.

A careful consideration of the testimony adduced leads to the conclusion that the many differences between the parties may very well have contributed to plaintiff's two nervous breakdowns, and only in this sense can the rift in their relationship be attributed to her mental condition. Defendant contends that plaintiff consented to the separation by reason of her failure to go or offer to go to the Eggleston home with a desire or an intent to remain there after she returned from Mercyville. It appears from the evidence, however, that while she was at Mercyville, defendant and the two children lived with his mother, and that at the time plaintiff returned from Mercyville there were no beds at the Eggleston address, defendant having removed them to his mother's home, together with other bedroom furniture, bed and table linen, all the children's furniture and linen, and the washing machine. Under the circumstances it is idle to contend that she should have returned to a home which afforded no adequate living accommodations.

One of the principal causes for dissension was defendant's dislike for members of plaintiff's family, particularly her

evidently so obsessed with this idea about her insane mental condition that he would not accept the decision of any doctor whose opinion did not conform to his own, and the findings of these five physicians who pronounced her mentally sane, did not satisfy him. His objections to her returning to the family home were based on unsubstantiated charges that on several occasions his wife threatened to take her own life as well as that of the children. There is some evidence to support these charges, but if any such emergency existed it indicated her mental state at Marysville. Her treatment there resulted in her mental and the subsequent psychiatric examinations and order of restoration by the County Court should have eliminated any obsessions or fears which defendant entertained thereafter.

A careful consideration of the testimony adduced leads to the conclusion that the many differences between the parties may very well have contributed to plaintiff's nervous breakdown, and only in this sense can the wife in their relationship be attributed to her mental condition. Plaintiff consented to the separation by reason of her failure to go or offer to go to the Eggleston home with a desire or an intent to remain there after the removal from Marysville. It appears from the evidence, however, that while she was at Marysville, defendant and the two children lived with his mother, and that at the time plaintiff returned from Marysville there were no beds at the Eggleston address, defendant having removed them to his mother's home, together with other bedroom furniture, bed and table linen, all the children's furniture and linen, and the washing machine. Under the circumstances it is idle to contend that she should have returned to a home which afforded no adequate living accommodations.

One of the principal causes for dissension was defendant's

mother and sister Frances. When Frances suggested that she accompany plaintiff and defendant on the trip to Sacred Heart Sanitarium in Milwaukee, defendant bluntly refused and advised Frances that if she went there by train he would take the plaintiff somewhere else. After plaintiff's return from Sacred Heart, defendant ceased visiting the Haggerty home, and advised his wife that her mother should not visit their home and if she did he "would kick her out." On the other hand, while severely criticizing his wife for associating and communicating with her family, defendant himself made it a practice to spend from one to two hours with his family five or six evenings a week. After the couple were first married, defendant's mother made almost daily visits at plaintiff's home. Plaintiff and defendant's mother had differences which led to heated controversies. On one occasion when the young boy had a bad cold, defendant's mother insisted that plaintiff give him honey, and inasmuch as plaintiff had already done so, she asked her mother-in-law to "please leave me alone," whereupon the older woman left "in a huff." Defendant later went to see his mother relative to the incident, sided with her and informed plaintiff that his mother came first. When both plaintiff and her mother-in-law met the young boy at nursery school one day, the elder Mrs. Kuehn asked plaintiff if she were fearful that she was going to kidnap her grandson, and the remark led to a serious altercation. Whenever plaintiff refused to follow the unsolicited advice of defendant's mother in caring for the couple's young son, it provoked an argument.

While plaintiff was being treated at Sacred Heart Sanitarium, defendant placed their son, who was then two years of age, in a nursery school without consulting Mrs. Kuehn, and made like arrangements the following September, when his wife returned

home. Plaintiff objected to the school arrangements, but defendant stated that "regardless of my wife's protest, I insisted that he go to nursery school and he did go, because of her mental condition." His insistence was explained by his desire to afford his wife an opportunity to carry on her household duties without the responsibility of caring for the child, but the facts disclose that plaintiff was obliged to get the boy ready in the morning, take him to school by 9:00, and then pick him up at noon, all of which required more time and effort than would have been necessary to look after the three-year old boy in the home.

Family finances were another cause for dispute. Defendant was meticulous in keeping an account of his expenditures, and expected plaintiff to account for everything she spent. Upon her failure to do so he accused her of diverting his funds to her family. After plaintiff came home from Sacred Heart Sanitarium defendant insisted that their expenses be curtailed because they "had to make up the five hundred dollars that was spent at Sacred Heart," and plaintiff said that after her return defendant gave her a household allowance of \$15.00 a week, and "fifteen dollars didn't go very far, as prices were considerably higher last year, and you would have to buy carrots and cheap vegetables, and serve them three different ways." She was "scared to tell him about the telephone bill, because he would holler at me about it." Although she had her own ideas about dressing their young son, defendant's mother insisted that plaintiff make him suits out of old suits of defendant, and "as long as she did that, I couldn't buy anything for Nicky. I know it was economy, but ... there were occasionally times when I would want to buy him a suit." Plaintiff was afraid to ask her husband for personal items such as hosiery because such a purchase would run counter to their program of reducing expenses.

home. Plaintiff objected to the third arrangement, but defendant stated that "regardless of what I do, I insisted that he go to nursery school and in the morning, but the facts disclose that plaintiff was obliged to get the boy ready in the morning, and that he picked him up at noon, all of which required some time and effort than could have been reasonably expected of a mother of an old boy in the home."

Family finances were another matter. Plaintiff was meticulous in keeping an account of all her expenses, and expected plaintiff to account for every dollar spent. When her failure to do so he accused her of falsifying the books to her family. After plaintiff called him a liar, he threatened to leave defendant insisted that their children be sent to boarding school to make up the five hundred dollars that he had "Secured Heart," and plaintiff said that when he returned defendant gave her a household allowance of \$20.00 a week, and plaintiff dollars didn't go very far, as prices were so high. Plaintiff last year, and you would have to buy vegetables and other necessities and serve them three different ways." She was "washed to tell it about the telephone bill, because he would hold her up about it." Although she had her own ideas about spending their money, defendant's mother insisted that plaintiff not spend out of old suits of defendant, and "see long as she did that, I couldn't buy anything for Nicky. I know it was economy, but... there were occasionally times when I would want to buy him a suit." Plaintiff was afraid to ask her husband for personal items such as hosiery because such a purchase would run counter

Plaintiff was constantly subjected to criticism by defendant. He considered his wife "extravagant" in the wasting of hot water. On one occasion when the clothes pole broke, defendant charged her with "hanging on the clothes line with her own weight and [concluded] that she caused the pole to shear at ground level." He objected to her knitting a scarf for her brother in the military service; if she wanted to knit "she could knit for her own children rather than for somebody else." In December of 1943 defendant began making notations as to his wife's conduct. In January of 1944 he made an entry to the effect that he had bathed their son, and in commenting on this before the master, defendant stated that "I didn't think I should be called on to do that," although at that time his wife was six or seven months pregnant and found it difficult to bend over and bathe the boy in their sunken bathtub.

Defendant expected plaintiff to confine herself to her household duties and the care of the children, with almost no diversion. After plaintiff's return from Sacred Heart Sanitarium in September they went to movies occasionally, and once to a dinner dance in November. Following the birth of their second child, they used to take the children for an automobile ride on Wednesdays, but the last time plaintiff went any place alone with her husband was in December of 1943, when he took her to a movie. Subsequently defendant sometimes went to a movie by himself, and he suggested to his wife that she go to a movie while he stayed with the children. He also told her "she could go to church for her recreation. She seemed to enjoy church going very much."

Defendant admits that although living in the same house, he had abstained from sexual relations with his wife since the

latter part of April 1944 and that "From May, 1944, I have not had love for my wife."

These and many other incidents were a constant source of friction, and it can readily be seen that Mrs. Kuehn's life with a husband who had ceased having marital relations with her and who admitted that he no longer loved her, was made so unbearable as to justify her leaving and refusing to return to him. The chancellor who heard the evidence was evidently of the opinion that plaintiff was living separate and apart without any fault of her own, and the record warrants this conclusion.

The law presents no serious difficulties. The remedy of separate maintenance provided by the statute is available to married women who, without their fault, are living separate and apart from their husbands. Ill. Rev. Stat. 1945, ch. 68, sec. 22. Defendant's contention that his wife consented to living separate and apart from him, and is therefore barred from the statutory remedy, is not supported by the evidence. His counsel cites Vock v. Vock, 365 Ill. 432, Barton v. Barton, 318 Ill. App. 68, and Thomas v. Thomas, 152 Ill. 577, in support of this contention. In the Vock case there was a specific agreement that the parties live apart, and the husband paid \$5000 for relief from all obligation of future support. In the Barton case the husband's work required him to make a trip to Dutch Guiana, and he was requested not to take his wife because of unhealthful conditions there; accordingly plaintiff, the husband, made arrangements with his employer to send defendant \$70.00 per month. After he had gone she gave up the home in Illinois and moved to Minnesota, voluntarily abandoning the home with an intention not to return. In the Thomas case the wife contended that she left home after becoming ill from sunstroke and did not know what she was doing, but the court found that she knowingly and voluntarily abandoned the home and absented herself for three weeks before

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These and many other incidents were a constant source

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unbearable as to herself, and leaving her no freedom to return to

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any fault of her own, and the court awarded this separation,

The law provides no serious difficulties. The remedy of

separate maintenance provided by the statute is available to

married women who, without fault, are living separate and apart

from their husbands. Ill. Rev. Stat. 1937, ch. 37, sec. 22.

Defendant's contention that his wife was separated from him

separate and apart from him, and in fact, he was not from the

statutory remedy, is not supported by the evidence. Ill. Rev. Stat. 1937, ch. 37, sec. 22.

See Yock v. Yock, 303 Ill. 47, 1931 Ill. App. 101, 102, and Thomas v. Thomas, 311 Ill. 177, 1929 Ill. App. 101, 102.

In the Yock case there was a written agreement that

the parties live apart, and the husband paid the bills for the

from all obligation of future support. In the Yock case the

husband's work required him to make a trip to Chicago and he

he was requested not to take his wife because of unhygienic

conditions there; accordingly plaintiff, the husband, made

arrangements with his employer to send defendant to Chicago for month

after he had gone she gave up the home in Illinois and moved to

Minnesota, voluntarily abandoning the home with an intention not

to return. In the Thomas case the wife contended that she left

home after becoming ill from sunstroke and did not know what she

was doing, but the court found that she knowingly and voluntarily

saying anything about returning. After a careful examination of the record we have reached the conclusion that the decree of separate maintenance here entered was fitting and proper.

It is urged by defendant that the court erred in awarding the custody of the children to plaintiff, and his counsel argues that as father of the children defendant has the paramount, if not absolute, right to their custody, unless it be shown that he is unfit or has waived or forfeited that right. It may be conceded that no charge was made or sought to be proved as to Mr. Kuehn's unfitness. However, the courts in this state have consistently adhered to the rule that the welfare of the children is the paramount issue and as between parents of infant children, where both are fit, the mother will be given preference. Miner v. Miner, 11 Ill. 43. The cases cited by defendant, where the father's right was sustained, were mostly contests between a father and grandparents, aunts or other related persons. The record before us serves only to demonstrate that plaintiff is a competent and devoted mother. Defendant's case is predicated almost entirely on the contention that she is mentally incompetent, but since her discharge from Mercyville Sanitarium the overwhelming evidence is to the contrary.

For the reasons indicated, we are of opinion that the decree should in all respects be affirmed, and it is so ordered.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

43705

ERVIN TURZINSKI, a minor, by
ESTHER TURZINSKI, his sister
and next friend,

Appellee,

v.

NORMAN PAM,

Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was struck and injured by defendant's automobile while attempting to cross in the middle of the block from the west to the east side of Kimball avenue, about 200 feet south of a viaduct, in Chicago on the evening of May 11, 1944. Suit against defendant resulted in a verdict and judgment in favor of plaintiff for \$3750, from which defendant took a direct appeal to the Supreme Court, asserting that a constitutional question, based on an instruction tendered by plaintiff and given by the court, was involved. The instruction was as follows: "You are instructed that at the time and place of the collision in question there was in full force and effect a certain statute of the State of Illinois which provided as follows: (a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk shall yield the right of way to all vehicles upon the roadway. ... (d) Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary. If you believe from a preponderance of the evidence that the plaintiff was a pedestrian upon said Kimball Avenue and was in the exercise of ordinary care and caution for his own safety, and if you further believe from a preponderance of

EVAN THURMOND, a minor, by
STEPHEN THURMOND, his father
and next friend,
Appellant,
vs.
KORAN RAY,
Appellee,
COURT, SOLE JUDGE.
APPEAL FROM SUPREME COURT

IT, JUSTICE OF THE PEACE IN THE CIRCUIT OF THE COURT,

Plaintiff was struck and injured by defendant's auto-
mobile while attempting to cross at the middle of the block
from the west to the east side of Illinois Avenue, about 200
feet south of a viaduct, in Chicago on the evening of May 11,
1944. Suit against defendant resulted in a verdict and judg-

ment in favor of plaintiff for \$37,500, from which defendant
took a direct appeal to the Appellate Court, asserting that a
constitutional question, based on an instruction framed by
plaintiff and given by the court, was involved. The instruc-
tion was as follows: "On the instant case as the state and

place of the collision in question there was a half cross
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this section, every driver of a vehicle shall exercise due care
to avoid colliding with any pedestrian upon any roadway and
shall give warning by sounding the horn when necessary. If
you believe from a preponderance of the evidence that the
plaintiff was a pedestrian upon said Kimball Avenue and was
in the exercise of ordinary care and caution for his own
safety, and if you further believe from a preponderance of

the evidence that the defendant violated said statute and that he was negligent in so doing and that such negligence on the part of the defendant proximately caused the occurrence in question through no fault on the part of the plaintiff, then you may find the defendant guilty." Although conceding that the language of the statute in paragraph (a) of section 75 (par. 172) of the Uniform Traffic Act, Ill. Rev. Stat. 1945, chap. 95-1/2, set out in the instruction, is a valid constitutional enactment, defendant nevertheless contended upon trial of the cause that that portion of paragraph (d) of said section of the statute set out in the instruction, is unconstitutional. However, the court declined to pass upon the constitutional question. In reviewing the ruling of the trial court the Supreme Court, in transferring the cause (Turzinski v. Pam, 392 Ill. 471), held that "The instruction, taken as a whole, stated a correct rule under the common law and the fact that a portion of the language of the statute was incorporated in the instruction did not change the rule of the common law announced in the instruction. It did not authorize a recovery merely for a violation of the statute, unless the jury believed, from the preponderance of the evidence, that the acts of the defendant constituted negligence which proximately caused the injury," and that the trial court was not required to pass upon the constitutional question and "properly declined to do so, for the reason that the instruction stated a correct rule under the common law." The ruling of the Supreme Court on this question disposes of the propriety of the instruction under consideration, which was the basis of the direct appeal to the Supreme Court.

As additional grounds for reversal it is urged (1) that the judgment of the trial court is contrary to the manifest

the evidence that the defendant violated said statute and that he was negligent in so doing and that such negligence on the part of the defendant proximately caused the occurrence in question shows no fault on the part of the plaintiff, then you may find the defendant guilty." Although conceding that the language of the statute in paragraph (a) of section 74 (part 172) of the Uniform Traffic Code, Ill. Rev. Stat. 1945, chap. 95-5/2, set out in the instruction, is a valid constitutional enactment, defendant nevertheless contends upon trial of the case that that portion of paragraph (a) of said section of the statute set out in the instruction, is unconstitutional. However, the court declined to pass upon the constitutional question. In reaching the ruling of the trial court the Supreme Court, in translating the case *Quinn v. City of Chicago*, 392 Ill. 471, held that "the instruction, taken as a whole, stated a correct rule under the common law and the fact that a portion of the language of the statute was incorporated in the instruction did not change the rule of the common law announced in the instruction. It did not authorize a recovery merely for a violation of the statute, unless the jury believed from the preponderance of the evidence, that the acts of the defendant constituted negligence which proximately caused the injury," and that the trial court was not required to pass upon the constitutional question and "properly declined to do so, for the reason that the instruction stated a correct rule under the common law." The ruling of the Supreme Court on this question disposes of the propriety of the instruction under consideration, which was the basis of the direct appeal to the Supreme Court.

As additional grounds for reversal it is urged (1) that

weight of the evidence, and (2) that the giving to the jury of plaintiff's instruction No. 14 constitutes reversible error.

The facts disclose that at the time of the accident, May 11, 1944, plaintiff was employed by the De Foe Finishing Company, whose plant is located on the southwest corner of Bloomingdale and Kimball avenues in Chicago. According to his testimony he was 16 years of age on March 20, 1944 and had been with the De Foe Company since August 1943. At the time he entered its employ he had falsely stated he was 17, when in fact he was only 15 years of age, but he was five feet ten inches tall, weighed about 140 pounds, was doing a man's work and received a man's pay.

The accident occurred about nine in the evening. That was the luncheon hour for the shift on which plaintiff was working. Plaintiff, his friend Clemens Cychosz, who was another employee, and a girl by the name of Lorraine Rossi, were walking south along Kimball avenue on the west side of the street, evidently headed for Grace's Restaurant located at North and Kedzie avenues. About half a block south of Bloomingdale avenue plaintiff started to cross to the east side of Kimball, although the distance would have been the same and he would not have gained anything by crossing to the other side of the street in the middle of the block. Plaintiff testified that there was a parked car on the west curb of Kimball avenue about 30 to 40 feet north of the point from which he proceeded to cross the street. He stated that when he reached the curb he saw the lights of defendant's car and that it was then under the viaduct about 200 feet north. According to plaintiff he walked out into the street slowly, taking eight or ten steps to travel the distance of ten feet, then looked again, and estimated that

weight of the evidence, and (2) that the giving to the jury of Plaintiff's instruction No. 14 constituted reversible error.

The facts disclose that at the time of the accident, May 11, 1944, Plaintiff was employed by the De Lee Company, whose plant is located on the southwest corner of Elmhurst and Kimball avenues in Chicago. According to his testimony he was 19 years of age on May 11, 1944 and had been with the De Lee Company since August 1943. At the time he entered the employ he had a letter stating he was 17, when in fact he was only 17 years of age, but he was five feet ten inches tall, weighed about 140 pounds, was doing a man's work and received a man's pay.

The accident occurred about nine in the evening. That was the location from the south on which Plaintiff was working. Plaintiff, in Plaintiff's opinion, who was another employee, and a list of the names of Plaintiff's co-workers, were walking south along Kimball avenue on the west side of the street, evidently headed for Grace's Restaurant located on North and Halsted avenues. About half a block south of Elmhurst avenue Plaintiff started to cross to the east side of Kimball, although the distance would have been the same and he could not have gained anything by crossing to the other side of the street in the middle of the block. Plaintiff testified that there was a parked car on the west curb of Kimball avenue about 30 to 40 feet north of the point from which he proceeded to cross the street. He stated that when he reached the curb he saw the lights of defendant's car and that it was then under the direct about 200 feet north. According to Plaintiff he walked out into the street slowly, taking eight or ten steps to travel the distance of ten feet, then looked again, and estimated that

defendant's automobile was about ten feet from him. He said that he turned quickly to his left, took a step toward the curb, and was struck by the right bumper and headlight of defendant's car. There is a conflict in the evidence as to the distance of defendant's car to the north when plaintiff first observed it, and also as to the circumstances under which the accident occurred. Plaintiff's foreman testified that he was walking about 50 feet behind him and that defendant's car passed the place where he was walking before plaintiff proceeded to cross Kimball avenue, and several witnesses contradicted plaintiff by testifying that he ran into the street directly into the path of defendant's oncoming car and did not walk out ten feet from the curb as deliberately as he had testified. There is also considerable conflict in the evidence as to the speed of defendant's car.

Inasmuch as this case will probably have to be retried, we do not undertake to discuss the evidence in detail or to pass upon defendant's contention that the verdict was contrary to the manifest weight of the evidence, because in the view we take plaintiff's instruction No. 14, given by the court, was so erroneous and inapplicable to the facts as to require a reversal. The instruction read as follows: "The Court instructs the jury that if a person, without fault on his part, is confronted with sudden danger or apparent sudden danger, the obligation resting upon him to exercise ordinary care for his own safety does not require him to act with the same deliberation and foresight which might be required under ordinary circumstances." Plaintiff's counsel relies principally on Kavanaugh v. Parret, 379 Ill. 273, as supporting the propriety of this instruction. That case involved a collision between a bicycle ridden by plaintiff and an automobile driven by defend-

ant. The accident occurred on a paved road at a point which was comparatively level, and visibility up and down the highway was unhindered for over a mile. It was a clear day. Plaintiff, then 16 years of age, and his companion, aged 17, were riding south on their bicycles. Plaintiff's companion was near the west side of the pavement and plaintiff was near the center line. Defendant was also driving her automobile in a southerly direction. There was evidence tending to show that she approached at a high rate of speed and did not sound her horn until she was very close to the two boys, causing plaintiff to suddenly swerve to the east to avoid hitting his companion. Defendant's evidence, on the other hand, tended to show that she sounded her horn intermittently for a distance of a half mile as she approached the boys, that she slackened her speed, and that when she turned into the east traffic lane to pass the bicycles, plaintiff swerved into that lane and was struck, and that in her effort to avoid striking him she swerved her car so far to the east that the left wheels of her car were off the pavement at the time plaintiff was struck. The instruction given in that case was similar to the one here in question, and in reviewing its propriety the court held that such an instruction, although abstract in form, is within the rule which entitles a plaintiff to have a jury instructed as to his theory of the case. The facts of that case warranted such an instruction, because plaintiff was suddenly confronted with danger, without his fault, and was obliged to act quickly.

Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, is the only other case cited by plaintiff in support of his contention as to the propriety of the instruction. In that case plaintiff was a passenger in one of the cars operated by the traction company, a common carrier. Through defendant's negligence, a fuse exploded, with a resulting loud report,

flame and smoke. The passengers rushed for the rear door, and in the ensuing panic plaintiff was pushed from the car and injured. The court gave an instruction similar to the one here under consideration, and upon review the Supreme Court held that no error was committed in so doing for the reason that there was sufficient evidence upon which to base the instruction and thus remove the objection that it was a mere abstract proposition of law, and for the further reason that the evidence showed that to a person of ordinary prudence there was sudden and apparent danger of fire.

Plaintiff seeks to justify this instruction because, as his counsel says, it conforms with his theory of the case that plaintiff was confronted with sudden danger, and he was entitled to have the jury instructed on that theory. However, the facts taken from plaintiff's own testimony, do not justify any such conclusion. Plaintiff did not proceed into the street by reason of being confronted with any sudden danger or apparent sudden danger, but according to his own version, he deliberately proceeded into the street, with the knowledge that defendant's car was approaching. Apparently his judgment as to the position of the car when he started, was faulty. He said he thought it was 200 feet away, but the testimony of one of his principal witnesses who was walking 50 feet behind him, refutes this contention. In any event, plaintiff evidently failed to look again until he was within the path of the car, and defendant's automobile was then so close that the collision could not be averted by either plaintiff or defendant. That situation was the result of plaintiff's own action, and although defendant's negligence and plaintiff's contributory negligence were questions to be determined by the jury, the instruction is nevertheless inapplicable to the facts in this case because it limits the jury's consideration to the time after plaintiff had gotten himself

flame and smoke, the passengers rushed for the rear door, and in the ensuing panic plaintiff was hurled from the car and injured. The court gave an instruction relating to this one here under consideration, and upon review the court held that no error was committed in the giving of this instruction. There was sufficient evidence upon which to base the instruction and the court was correct in the opinion that it was a more abstract proposition of law, and for this reason that the evidence showed that to a person of ordinary intelligence there was such an apparent danger of fire.

Plaintiff seeks to have the instruction removed, as his counsel says, it contains what he claims to be a statement of law not supported by the evidence, and to a certain extent, the jury instructed on that theory, however, the fact taken from plaintiff's own testimony, he was standing on the sidewalk, plaintiff did not proceed from the sidewalk to the rear door of being so threatened with any sudden danger or apparent danger, but according to his own version, he deliberately proceeded into the street, with the intention that he should see the approaching car, and when he saw it, he thought it was the car when he started, was falling, and he thought it was too late to get away, but the testimony of one of the witnesses who was within 50 feet behind him, states that he saw him, in any event, plaintiff voluntarily failed to look again until he was within the path of the car, and plaintiff's contention was then so close that the collision could not be averted by either plaintiff or defendant. That situation was the result of plaintiff's own action, and although defendant's negligence and plaintiff's contributory negligence were questions to be determined by the jury, the instruction is nevertheless inapplicable to the facts in this case because it limits the jury's

into a place of danger and eliminates from their consideration his conduct preceding that time. One of the issues in this case was whether plaintiff was contributorily negligent in getting himself into a position of danger, and not whether he exercised ordinary care after he had gotten into that position. The instruction was calculated to defeat this consideration, and therefore we think it was error to give it to the jury. The reported cases in this state are fully in accord with the proposition laid down in McLaren v. Byrd, Inc., 296 Ill. App. 345, that "One cannot create an untoward situation or emergency by his own action and then by reason of such situation so created be relieved from such responsibility as the law requires of a person acting under normal conditions." In Blumb v. Getz, 294 Ill. App. 432, the court, in considering a similar instruction, said that it "did not cover care of the defendant immediately prior to or when going into the dangerous place, but only his care after he had arrived there, and was therefore properly refused by the trial court," and later added that "it has been repeatedly held that it is improper to give an instruction which limits the question of due care to the conduct of the plaintiff at the time of the injury, regardless of his conduct in placing himself in a place of danger." In Edwards v. Hill-Thomas Lime Co., 378 Ill. 180, which is almost contemporaneous with Kavanaugh v. Parret, it was held that an instruction of this kind "entirely ignores the question of whether the appellee [plaintiff] was guilty of contributory negligence in placing himself in that situation. Similar instructions have been repeatedly condemned by this court." We do not regard Kavanaugh v. Parret as expressing any new rule on the subject. The evidence in that case as to the collision was in sharp dispute, and if the testimony warranted the conclusion that defendant, approaching at a high rate of speed, failed to blow her horn until she was very close

into a place of danger and all the time from their responsibility
his conduct preceding that time, one of the factors in this
case was whether plaintiff was contributorily negligent in
getting himself into a position of danger, and not whether he
exercised ordinary care after he had gotten into that position.
The instruction was submitted to the jury in this connection,
and therefore we think it was error to give it to the jury.
The reported cases in this state are fully in accord with the
proposition laid down in Heppner v. York, 190 Ill. App.
345, that "one cannot expect an untoward situation or emergency
by his own action and then be excused of contributory negligence
to relieve from such responsibility as the law requires of a
person acting under normal conditions." In Heppner v. York, 190
Ill. App. 488, the court, in commenting on a similar instruction,
said that it "did not cover some of the points which it was
prior to consider, into the dangerous area, but only the
area after he had entered there, and whether there properly re-
sulted by the trial court," and that it has been re-
portedly held that it is proper to give an instruction which
limits the question of a party's contributory negligence to the time of the injury, regardless of the position in place
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345, 190 Ill. App. 488, which is almost verbatim correct in the
V. Heppner, it is held that an instruction of this kind is proper
ignores the question of whether the plaintiff [defendant] was
guilty of contributory negligence in place of himself in that
situation. Similar instructions have been reported in numerous
by this court." We do not refer to Heppner v. York as ex-
pressing any new rule on the subject. The evidence in that case
as to the collision was in sharp dispute, and if the testimony
warranted the conclusion that defendant, approaching at a high

to the boys on the bicycles, thus confronting them with sudden danger or apparent sudden danger, then of course the obligation resting upon them to exercise ordinary care did not require them to act with the same deliberation and foresight which might be required under ordinary circumstances. In that case the instruction was justified because it was warranted by the evidence. In the case at bar, as already stated, the issue was whether plaintiff was contributorily negligent in getting himself into a position of danger, and not whether he exercised ordinary care after he had gotten into that position.

We think the instruction was so prejudicial as to require reversal. The judgment of the Superior Court is therefore reversed, and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR NEW TRIAL.

Sullivan, P. J., and Scanlan, J., concur.

to the boys on the bicycles, it is not surprising that with sudden danger or apparent sudden danger, when of course the obligation resting upon them to exercise ordinary care did not require them to act with the same deliberation and foresight which might be required under ordinary circumstances. In that case the instruction was justified because it was warranted by the evidence. In the case at bar, as already stated, the issue was whether or not it was reasonably negligent in getting himself into a position of danger, and not whether he committed an act of negligence. He had gotten into that position. He thinks the instruction as so presented is to require reversal. The judgment of the Superior Court is therefore reversed, and the case remanded for a new trial.

THOMAS J. MURPHY, J.
JAMES J. MURPHY, J.

Sullivan, P. J., and Fennell, J., concur.

43719

MARY ANN KUEHN,
Appellant,

v.

NICHOLAS H. KUEHN, JR.,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

331 I.A. 414 1/6

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This appeal is a companion case to Kuehn v. Kuehn,
No. 43665, in which an opinion has been concurrently filed.

The decree for separate maintenance entered August 1, 1945 provided for the payment of \$600 attorneys' fees, payable \$200 in five days, \$200 in thirty days, and \$200 in sixty days. August 9, 1945 defendant filed a petition seeking to modify the decree with respect to the terms of payment. Plaintiff filed an answer thereto, and after a hearing before Judge Padden an order was entered October 23, 1945 denying defendant's petition, and directing him to pay the amount of attorneys' fees due under the decree on or before December 19, 1945. November 9, 1945, after defendant had already filed notice of appeal from the decree of August 1, 1945, he was granted a change of venue in the Superior Court, and on December 21, 1945, more than thirty days after the entry of Judge Padden's order of October 23, 1945, a hearing was had before Judge Schwaba on the rule to show cause for nonpayment of attorneys' fees. Thereafter, on motion of defendant's counsel, Judge Schwaba on January 4, 1946 entered an order nunc pro tunc as of December 21, 1945, modifying the decree of August 1, 1945 in defendant's favor with respect to the terms of payment, and dismissing the rule to show cause, which had been issued. Defendant has filed no briefs on the appeal taken by plaintiff from Judge Schwaba's order.

THE COURT OF APPEALS
IN THE DISTRICT OF COLUMBIA
FOR THE DISTRICT OF COLUMBIA
IN THE MATTER OF THE ESTATE OF
JAMES H. HARRIS, DECEASED

WILLIAM H. HARRIS, Plaintiff,
vs.
JAMES H. HARRIS, Defendant.

This case arises out of the will of James H. Harris, deceased.

The will of James H. Harris, deceased, was admitted to probate in the District of Columbia on January 1, 1944.

The will provided for the appointment of a trustee to hold the property for the benefit of the children of James H. Harris, deceased.

James H. Harris, deceased, died on January 1, 1944, and was survived by his wife, Mary H. Harris, and his children, William H. Harris and James H. Harris, Jr.

The will provided that the trustee should hold the property for the benefit of the children of James H. Harris, deceased, until they reached the age of majority.

The will further provided that the trustee should pay to the children of James H. Harris, deceased, the income from the property held in trust for their support, education, and maintenance.

The will also provided that the trustee should have the power to sell, lease, or otherwise dispose of the property held in trust for the children of James H. Harris, deceased.

The will further provided that the trustee should have the power to execute any instrument necessary or proper to carry out the purposes of the will.

The will also provided that the trustee should have the power to sue and be sued in the name of the trust.

The will further provided that the trustee should have the power to make any contract necessary or proper to carry out the purposes of the will.

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The will also provided that the trustee should have the power to execute any instrument necessary or proper to carry out the purposes of the will.

No court reporter was present on December 21, 1945, and there being no report of proceedings, this appeal is limited solely to the legal questions involved. It is a fundamental rule that pleadings are required to form an issue so that the court and the litigants may know what is to be tried. The only pleading filed in this cause which raised the issue as to whether the method of payment of attorneys' fees should be modified was defendant's petition of August 9, to which plaintiff had filed her answer, and the issue there raised was tried before Judge Padden and determined adversely to defendant by the order denying the petition. No subsequent petition was filed, nor was any motion made to vacate or modify Judge Padden's order of October 23. Consequently that order was final, and after a lapse of thirty days the court was without jurisdiction to modify the decree nunc pro tunc or otherwise. Moreover, defendant had filed notice of appeal from the decree for separate maintenance which included the provision for payment of attorneys' fees, and thereafter the court had no further jurisdiction to modify the decree. Ill. Rev. Stat. 1945, ch. 110, par. 200, sub-par. (2) (sec. 76, sub-sec. (2)).

Therefore that portion of the order entered January 4, 1946 nunc pro tunc as of December 21, 1945, purporting to modify the decree of August 1, 1945 as to the method of payment of attorneys' fees, is reversed, and the cause is remanded with directions to expunge that portion of the order from the record. Costs are taxed against defendant.

ORDER REVERSED IN PART AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

33178/414

43917

SAM SERIO,
Appellee,
v.
BOWMAN DAIRY COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

217

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, while standing alongside his truck parked on Evergreen avenue in the City of Chicago on the morning of June 28, 1945, was struck and severely injured by one of defendant's trucks. His suit for damages resulted in a verdict and judgment for \$20,000, from which defendant appeals.

As the principal ground for reversal defendant contends that its driver was not guilty of any negligence and that plaintiff himself was guilty of contributory negligence as a matter of law. The essential facts disclose that plaintiff was engaged in the business of peddling fruits and vegetables on the streets of Chicago from a truck in which he carried his merchandise. On the morning of the day in question he made his purchases at the South Water Market and then proceeded to canvass his customers as usual. His first stop was approximately in front of 737 Evergreen avenue where he parked his truck, as he states, a foot from the south curb, facing in an easterly direction. After stopping his truck he called in a loud voice so that the various customers who lived in the neighborhood would be aware of his presence, and several minutes later one of his customers, Joseph De Michael, who lived on Evergreen avenue, came over to purchase some fruit. On the rear of his truck plaintiff carried a scale which he used for weighing his merchandise. He testified that immediately before

SAM SERIO,

Appellee,

v.

BOWMAN DAIRY COMPANY,

a corporation,
Appellant.

SUPREME COURT

COOK COUNTY

MR. JUSTICE TRINIDAD DELIVERED THE OPINION OF THE COURT.

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that its driver was not guilty of any negligence and that plaintiff himself was guilty of contributory negligence as a matter of law. The essential facts disclose that plaintiff was engaged in the business of peddling fruits and vegetables on the streets of Chicago from a truck in which he carried his merchandise. On the morning of the day in question he made his purchases at the South Water Market and then proceeded to canvass his customers as usual. His first stop was approximately in front of 737 Evergreen Avenue where he parked his truck, as he states, a foot from the south curb, facing in an easterly direction. After stopping his truck he called in a loud voice so that the various customers who lived in the neighborhood would be aware of his presence, and several minutes later one of his customers, Joseph De Michael, who lived on Evergreen Avenue, came over to purchase some fruit. On the rear of his truck plaintiff carried a scale which he used for weighing his merchandise. He testified that immediately before

the accident he was standing on the pavement, just to the north of the truck, that he had put some pears and peaches in a paper bag, and while facing toward the south, was struck by defendant's truck which approached from the west. He did not see the Bowman truck at any time before the impact, and states that he was standing still when the truck hit him. Joseph De Michael corroborated his testimony, and also testified that before the accident occurred he did not see the driver of the Bowman truck nor did he hear any horn or warning signal. Another witness, Elise Fiatroni, one of plaintiff's customers, lived in the second apartment of the building directly in front of where plaintiff's truck was parked. When she heard plaintiff's voice on the morning in question she went to a window facing on the street, from which she was looking out immediately prior to and at the time of the accident, and saw De Michael and plaintiff standing on the pavement near the truck. She states that while plaintiff was standing close to the truck reaching for some fruit, she noticed that defendant's truck was coming from the west, that its driver was looking down as if searching for something and that the truck struck plaintiff while he was standing still. All the witnesses agree that there was no other traffic proceeding in an easterly direction, and it is reasonably clear that no cars were parked along the north curb opposite Serio's truck at the time of the accident. Defendant's driver is the only witness who testified that another vehicle was coming from the east and passed him just about the time that he struck plaintiff.

The only occurrence witness called on behalf of defendant was John D. Klasema, its driver. After testifying that he had been employed by the Bowman Dairy Company for many years and describing his duties as a salesman, he states that as he came down Evergreen avenue a vegetable truck was standing on the

The only occurrence witness called on behalf of defendant was John D. Klazema, its driver. After testifying that he had been employed by the Roman Dairy Company for many years and describing his duties as a salesman, he stated that as he came east and passed his last about the time that the coroner plaintiff witness who testified that another vehicle was coming from the at the time of the accident. Defendant's driver is the only no cars were parked along the north and opposite side's track ing in an easterly direction, and it is respectfully stated that all the witnesses agree that there was no other vehicle proceed- that the truck began passing plaintiff's vehicle while it was still its driver was looking down at the road for something and noticed that a truck was coming from the west, that was standing in the middle of the road for some time, she the pavement near the truck. The truck which plaintiff of the truck, and the defendant's vehicle standing on which she was looking out the window to and at the time that the passing is not so a truck was on the street, from truck was parked. That the truck's voice on the morn- apartment of the building. Plaintiff's friend of whose plaintiff's wife testified, and of plaintiff's defendant lived in the second floor, and he was very close to the truck's address, not defendant called in his car and the driver of the Roman truck corroborated his testimony, and also testified that before the defendant's truck passed him, he saw the truck's driver and that he

south side of the street. "There was a man in back of the truck and a man alongside of the truck. I was going along ten miles an hour and I was almost past the truck; I felt a bump, and when I stopped the man was lying in front of his truck facing north. Then I got out of my truck and went right back and talked to him. He was sitting, he was sitting up then. As I passed this truck and when I approached the truck there was no other traffic traveling east ahead of me. As I approached the truck that was standing there was traffic going west on Evergreen. One car passed me at the accident, going west. When I met this westbound vehicle, I was alongside the vegetable truck. I don't know if there were any cars parked on the north side of Evergreen Street." On cross-examination he testified that "I saw the fruit peddler at the north side of his truck when I started going east from Halsted street on Evergreen, and I saw another man in the rear of the fruit and vegetable truck. The man in the rear was standing still when I saw him, and the man that I saw standing on the north side of the fruit truck [plaintiff] was also standing still. *** Neither of them moved at all. *** I watched him [plaintiff] as I approached him, and he remained at the side of the fruit truck all the time. *** The fruit truck was parked two or three feet from the south curb. *** As I approached the fruit truck there were three or four feet between the right side of my truck and the man who was standing at the north side of the fruit truck. I watched him until I got up opposite him, and when I got up to him and for as long as I could see him, he was in the same position. I saw him until he got up to the front glass, I saw him through the front glass, but not after that, I did turn my head to the right. I could see him off at an angle as I was passing him. The last time I saw him is between three and four feet from the truck and in the same position that I have told you about.

I didn't notice whether he had anything in his hand the last time I saw him, and I continued straight on ahead, and I didn't turn to my right and I didn't turn to my left. *** Then I felt a bump. I did not know what kind of a bump it was, but I knew it wasn't from the street. Right after I heard the bump I heard a scream or outcry. I traveled about eight feet between the time I felt the bump and heard the scream. I traveled straight ahead. After I heard the scream I put on the brake. *** I did not sound the horn at any time before I felt the bump. At no time from the time I left Ogden [presumably Halsted] up until I felt the bump, did I see the fruit peddler turn around and look at me."

There is nothing in Klasema's testimony or that of any other witness to indicate that plaintiff was guilty of contributory negligence. Klasema admits that he saw plaintiff standing by his truck and that he continued to stand there until he was struck. There was nothing ahead of Klasema to obstruct his view, and he admits that the automobile which he says he saw coming from the east and which passed him as he struck plaintiff, did not cause him to swerve either to the right or left. These circumstances, taken in connection with the testimony of Elise Fiatrioni, may well have led the jury to believe that Klasema's conduct in looking downward in search of something in his truck immediately preceding and at the time of the impact, was the proximate cause of the accident. No other plausible explanation is offered by any of the witnesses. Certainly there is nothing in the evidence which would warrant the conclusion that plaintiff was guilty of contributory negligence as a matter of law; indeed, Klasema's own testimony seems to indicate that plaintiff was free from contributory negligence.

Another ground urged for reversal is that two of the instructions tendered by plaintiff and given by the court,

were prejudicial. These instructions read as follows:

"The Court instructs the jury that the law requires the driver of an automobile on a public street to exercise reasonable care, foresight and vigilance in the operation and control of such machine to avoid running it upon or against persons or vehicles who may be on, or crossing the public street.

"The jury are instructed that the general public have a right to use and be on a public street, sidewalk or curb of a city and including that portion of the street which is ordinarily used by vehicles, and they do not become trespassers by so doing or being there."

With reference to the first instruction, although the words "foresight and vigilance" are not ordinarily used in an instruction of this character, their inclusion could not have been so prejudicial as to induce a verdict. The criticism leveled at the latter instruction is that the word "trespassers" was misleading. Defendant says that there is nothing in the pleadings to indicate that either of the parties claimed plaintiff to be a trespasser by reason of his presence in the street. Although that term is inapt in describing plaintiff's presence alongside of his truck, the effect of the instruction was to charge the jury that the general public have the right to use or be on a public street or pavement which is ordinarily used by vehicles, and it enunciated the correct rule of law.

The only other ground urged for reversal is that the verdict of the jury was excessive. The undisputed evidence shows that plaintiff suffered a serious fracture of the left leg, resulting in a permanent shortening of between one and one-half to one and three-quarter inches. The doctor's bill was \$750, plaintiff's hospital bill was \$377, and he sustained

a total loss of his average weekly earnings of \$50 for over a year. Although the fracture did not directly involve the knee joint, a Kirschner pin was so placed as to extend into the knee joint. At the time of the trial plaintiff still could not bend his knee more than thirty to forty degrees, and defendant's own expert testified that plaintiff would have a permanent bowing of twenty to twenty-five degrees. Plaintiff's work required him to operate his truck in the sale of his fruits and vegetables, and to load and unload the vehicle, which necessitated his climbing on and off the truck, and neither by training or experience was he fitted to do any other kind of work. None of these facts are seriously disputed, and under the circumstances we think that the verdict of \$20,000 was not excessive.

From a careful examination of the record we are satisfied that the case was fairly tried; that the jury were amply justified in finding by their verdict that defendant was negligent in the operation of its truck and that plaintiff was not guilty of contributory negligence; and that the award of damages was not excessive. Therefore the judgment should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

44074

STEVE GUVO,

Appellee,

v.

FRANK BANIS et al.,
Defendants.

FRANK BANIS,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In Guvo v. Banis, 330 Ill. App. 243, we affirmed a judgment in favor of plaintiff for \$3228, entered pursuant to the verdict of a jury finding defendant guilty of negligence and of willful and wanton conduct. Subsequently plaintiff filed a creditor's bill alleging the affirmance of his judgment, the issuance of an execution, and the return thereof by the sheriff showing that defendant could not be found in the county and that no part of the judgment was satisfied. The complaint alleged that defendant has an equitable interest in certain real estate within the county, as shown by an agreement for warranty deed; that he had been evading service of process since the entry of judgment; that in his appeal to this court from the judgment he filed no bond, and as a result thereof it has become impossible for plaintiff to collect the judgment; and that unless a temporary restraining order is issued, defendant will put forever out of reach of plaintiff such interest as he has in said real estate. Notice of a motion for a temporary restraining order was served upon defendants, and all parties being represented in open court by their counsel, the following temporary restraining order was entered on January 21, 1947:

"On motion of Attorney for plaintiff herein for a Writ of Injunction directed against Success Savings & Loan Association, formerly known as Naprstek Savings & Loan Association,

47034.

CONFIDENTIAL

1.5

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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TO: DIRECTOR, FBI (100-388610) FROM: SAC, NEW YORK (100-100000) (P)

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due notice of said motion having been given to the said Success Savings & Loan Association, and the said Success Savings & Loan Association and Frank Banis being present in open Court through its counsel, and the Court having examined the sworn Complaint filed in this cause and having heard the arguments of counsel and being otherwise fully advised in the premises, doth therefore order, adjudge and decree as follows:

"1. That Success Savings & Loan Association, formerly known as Naprstek Savings & Loan Association, be and it is hereby restrained and enjoined from declaring any forfeiture under the terms and provisions of certain Articles of Agreement recorded in the Office of the Recorder of Deeds of Cook County, Illinois, as document No. 12806320, until the further order of this court.

"2. That Success Savings & Loan Association, formerly known as Naprstek Savings & Loan Association, be and it is hereby restrained and enjoined from transferring, conveying or delivering any deed or deeds to said premises to either the defendant, Frank Banis, or any nominee of the said Frank Banis, until the further order of this Court.

"3. That the defendant, Frank Banis, be and is hereby restrained and enjoined from transferring, conveying or delivering any interest or right or title to the said premises herein described.

"4. That this injunction order is conditioned upon the plaintiff posting a proper surety bond in the sum of \$1,000.00, which will meet with the approval of this Court, and that in the event that the defendant, Frank Banis, ceases to make his proper monthly payments to the defendant, Success Savings & Loan Association, then upon due notice presented to the plaintiff, the plaintiff shall continue to make said payments."

On the same day defendant filed a motion to strike the complaint, specifying six separate grounds, none of which questioned plaintiff's right to a temporary injunction pending a hearing on the merits of the cause.

On February 7 the court denied defendant's motion to strike and approved plaintiff's injunction bond. Thereafter, on February 18, defendant filed his bond and perfected his appeal from the temporary restraining order of January 21. The other defendant, Success Savings & Loan Association, did not join in the appeal.

The only question presented is whether the order for the temporary injunction was improvidently entered. As the sole ground for reversal defendant urges that he has a homestead in the premises by virtue of a contract which he may claim against his creditors and that there is no power or authority vested in the court to require him to execute the conveyance as prayed for. The gravamen of his argument is that the complaint does not state a prima facie cause of action in that (1) it does not show proper execution and return, and (2) defendant, being the purchaser under the contract, has a homestead in the property which can be taken away only by deed or abandonment without deed, and authorities are cited as tending to support both of these propositions.

In the view that we take, neither of these questions can be considered upon this appeal. Defendant appeals from an interlocutory injunction entered January 21, whereas both of his points and the entire argument predicated thereon, are directed to the refusal of the court to allow his motion to strike the complaint. The defenses thus interposed go to the merits of the cause and have no relation to the question whether or not the injunction order was properly entered; the merits of the controversy will be adjudicated in due time.

The law is well settled that the function of a temporary injunction is to preserve the status quo; it does not conclude any rights of the parties. It is also well settled that an applicant for an interlocutory injunction is not required to make out a case which will entitle him, at all events, to relief at the hearing on the merits. Baird v. Community High School Dist., 304 Ill. 526; Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570; Schuler v. Wolf, 372 Ill. 386; People v. Standidge, 333 Ill. 361.

By his motion to strike defendant admitted that he had been evading service of process; that he has an equitable interest in certain real estate; and that unless a temporary restraining order were issued, he would be likely to dispose of his interest in the real estate and place it out of reach of the plaintiff. Under the circumstances it was the duty of the court to grant a temporary injunction, the effect of which would be nothing more than the mere maintenance of the status quo. It is conceivable that under the allegations of the complaint, if the injunction were denied, plaintiff would lose his right to sequester any interest that defendant might have in the real estate in which he has an equitable interest.

Since this is only an appeal from an order granting plaintiff a temporary injunction, we are of the opinion that the order should be and it is, therefore, affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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Agenda No. 1.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
OCTOBER TERM, A. D. 1946.

The People of the State of Illi-
nois,
Plaintiff-Defendant in Error,
vs.
PAUL ZELEN,
Defendant-Plaintiff in Error.

Error to the
County Court of
McHenry County.

WOLFE,-- P. J.

In July 1945, the States Attorney of McHenry County filed a petition in the County Court of said County, alleging that Paul Thomas Zeien was a dependent and neglected child under the age of seventeen years, residing at Huntley in said county; that Paul Zeien is the father of said child, and Marion Zeien whose address is unknown, is the mother of the child; that the mother consents to have the child taken from her and placed for adoption; that the father, Paul Zeien, is an unfit person to have the care and custody of the child, and that it is for the best interest of said child, and the state, that he be taken from said Paul Zeien and placed under proper guardianship. Summons was ordered issued showing service on Paul Thomas Zeien and Paul Zeien on July 14, 1945. Marion Zeien was not served with summons.

On motion of C. Russell Allen, Assistant States Attorney, leave was granted to the People to amend the petition to include Marion

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Pauline Zeien and Katherine Mary Zeien as dependent children under ¹⁷seventeen years of age, and that summons was issued against Paul Zeien in the matter of said dependency on July 13, 1945. No amendment was actually made, or amended petition filed. Hearings were had upon the petition, and the three children were found to be dependent children. Louise M. Brooks, the Probation Officer of McHenry County, was appointed guardian of said children, and she was given full charge of their care and support, placement and education, with power to consent to their adoption without notice to, or consent of the parents.

On November 19, 1945, Don A. Wicks, State's Attorney for McHenry County, filed a petition in said County Court stating that Paul Zeien, without the knowledge, or consent of Louise M. Brooks, took Katherine Mary Zeien from the Industrial Training School, where she had been placed by her guardian, to Elgin, Illinois, where he kept her in defiance of the order of Court. He prayed for a rule to show cause against Paul Zeien, as to why he should not be adjudged guilty of contempt of Court.

Paul Zeien filed an answer and attempted to justify his actions, and show why he was not guilty of contempt of Court. Hearing was had and the trial court ordered that Paul Zeien be held in contempt of Court, and fined \$25.00, and costs in the amount of \$15.00. It is from this judgment that Paul Zeien has brought the case to this Court by a writ of error. It is insisted by the plaintiff in error that the proceedings in the County Court were void, because the mother of the children alleged to be dependent, was never properly served with a summons, as the statute in such cases provides. It is conceded by the defendant in error, that the proceeding as to Marion Zeien is

void, but claims that the Court had jurisdiction of the children, and the plaintiff in error, and therefore is valid as to the plaintiff in error.

[] The Statute provides in cases of this kind that both of the parents should be served with summons notifying them of the proceedings, and it is conceded in this case that the mother of the children was not served with summons, as provided by the Statute. In the case of the People vs. McDonald, 225 Ill. App. 447, the father of Charles McDonald, a child of 15 years of age, filed a petition in the County Court of Sangamon County, alleging that Charles McDonald was a delinquent child; that the child was in the custody of the sheriff of said county, and that Elizabeth McDonald was the mother of said child, living in Springfield, Illinois. Summons was ordered for W. McDonald, the father, but not for Elizabeth McDonald, the mother. A hearing was had upon the petition and Charles McDonald was found to be a delinquent child, and sentenced to St. Charles School for boys.

Charles McDonald, by his next friend, (his father,) sued out a writ of error to the Appellate Court of the Third District. The Court, in passing upon the merits of the case, uses this language: "And it is urged, as a ground for reversal of the order, that no summons was issued or served upon Elizabeth McDonald, the mother of the alleged delinquent child. The statute requires that all persons named in the petition shall be made defendants, and shall be notified of such proceedings by summons. Chapter 23, section 4, Rev. St. (Cahill's Ill. St. ch. 23, Par. 322). The record does not show that any summons was issued or served upon the mother of the delinquent child, and, so far as the record shows, she had no notice of the proceedings. The issuance of a summons and service upon the defendant in proceedings of this

id, but claiming that the court in its jurisdiction of the children,

and the plaintiff in error, and therefore is valid as to the plaintiff

error.

This statute provides in cases of this kind that both of the

parents should be served with summons and notice of the proceedings,

and it is conceded in this case that the mother of the children was not

served with summons, as provided by the statute. In the case of the

people vs. McDonald, 223 Ill. App. 171, the father of Charles McDonald,

child of 15 years of age, filed a petition in the County Court of

Madison County, alleging that Charles McDonald was a delinquent child;

and that the child was in the custody of the mother of said county, and that

Elizabeth McDonald was the mother of said child, living in Springfield,

Illinois. Summons was ordered for W. McDonald, the father, but not

for Elizabeth McDonald, the mother. A hearing was had upon the petition

and Charles McDonald was found to be a delinquent child, and sentenced

to St. Charles School for boys.

Charles McDonald, by his next friend, (his father), sued out a

writ of error to the Appellate Court of the Third District, and Court,

relying upon the merits of the case, made this assignment: "And it

urged, as a ground for reversal of the order, that no summons was

served on or served upon Elizabeth McDonald, the mother of the alleged

delinquent child. The statute requires that all persons named in the

petition shall be made defendants, and shall be notified of such pro-

ceedings by summons. Chapter 82, section 4, par. 2d, (Smith's Ill.

. ch. 82, sec. 4, par. 2d). The record does not show that any summons was

served or served upon the mother of the delinquent child, and, in fact

the record shows, she had no notice of the proceedings. Therefore

a summons and service upon the defendant in proceedings of this

character is jurisdictional. The proceeding is purely statutory, and all the requirements of the statute must be complied with to give the court jurisdiction to enter final judgment. The mother of the child had a right to be heard and contest at the hearing the entry of the order of committal. The judgment is therefore reversed and the cause remanded."

In the case of The People vs. Lynch, 223 Ill. Page 346, a similar question was before our own Supreme Court. In this case a habeas corpus proceeding was instituted to attack the validity of the County Court's action in not serving the mother of the defendant with summons in the dependency proceeding. On Page 347 of the opinion, we find the following: "Among other things, the petition alleges that the proceedings under which Elizabeth was committed are void, because the petitioner, her mother, was not notified of the proceedings, as required by section 5 of the act in question. This section provides not only that a summons shall issue for the person having the custody or control of the child or with whom it may be, and served on such person at least twenty-four hours before such hearing, but that the parents of the child, or its legal guardian, or if there is neither or their residence is not known, some near relative, shall then be notified of the proceedings. Section 5 of this act clearly intends that the parents should have a reasonable notice of proceedings such as these, so that they could appear and be fully heard before they were deprived of the care and custody of the child. Manifestly, under this statute this hearing is not to be a mere perfunctory matter. While it may not be necessary to carry it on with all the formalities of an ordinary lawsuit, still the parents, and those who by nature are most

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deeply interested in the welfare of the child, must have ample opportunity to present all the facts. The home is the basis of our present civilization. The relations of parent and child are so important and sacred that they should not be interfered with or destroyed unless absolutely essential to the well being of society, and then only when the public authorities have been satisfied as to the necessity of such action after a full investigation and due notice to all interested parties. In the commitment of Elizabeth McEntee the record shows that the authorities not only failed to comply with the letter, but seemingly with the spirit, of the Juvenile Court law.

"Many other grounds are set forth why the finding of the trial court is void, but they will not require discussion in view of what has been said on the question of notice. No proper legal notice having been served upon the relatrix, the mother and legal guardian of Elizabeth McEntee, on the hearing before the juvenile court, the order of that court must be held void." It is our conclusion that the proceedings in the County Court were a nullity and void.

Another reason why the plaintiff in error cannot be held in contempt of court, is because there was not a proper petition filed in that Court alleging that Katherine Mary Zeien was a dependent, or neglected child. The States Attorney asked leave to amend the original petition claiming that Marion Pauline and Katherine Mary Zeien were dependent and neglected children. The amendment was never made. Being granted leave to amend the petition does not constitute an amendment. Perhaps the leading case on this subject is *W. C. R. R. Co. vs. Wleczorek*, 151 Ill. Page 579 at 583 we find the following: "On motion made by the defendant for non-suit, leave was asked by plaintiff to amend his

The first part of the paper discusses the importance of the study of the history of the United States. It is pointed out that the study of history is not only a means of understanding the past, but also a means of understanding the present and the future. The author argues that the study of history is essential for the development of a nation and for the well-being of its people. He states that the study of history is a means of understanding the human condition and of finding solutions to the problems of the world. The author also discusses the importance of the study of the history of the United States in the context of the world. He argues that the study of the history of the United States is essential for understanding the role of the United States in the world and for understanding the challenges that the United States faces in the future. The author concludes that the study of history is a means of understanding the human condition and of finding solutions to the problems of the world.

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declaration. The motion for non-suit was overruled, and the leave granted. The proposed amendment was not in fact made, and the declaration is presented, upon this record, without amendment, and in all respects as it was when the motion for non-suit was entered. True, leave was given to amend the declaration, and this leave, together with the words of the proposed amendment, and where to be placed in the pleading, is shown by the bill of exceptions, and while the Appellate Court saw fit to treat the leave given as amounting in effect to an amendment actually made, we do not feel at liberty to so regard it. If a party, for any reason, disregards the leave given by the trial court to amend his pleading, so as to make it correspond with the proofs, and omits, without justifiable cause, the due incorporation into the record of the amendment pursuant to the leave, this court, sua sponte, has no authority to carry out the leave, make his amendment for him, interpolate it into the record, and thereby save him harmless of error assigned. After obtaining such leave, the plaintiff was in no wise obliged to exercise the privilege given and make the amendment, and until the amendment was in fact made, the declaration in all respects remained the same, as though no leave to amend it had been given. Ogden v. Town of Lake View, 121 Ill. 422." To the same effect is Burns vs. Kaylor, 264 Ill. App. 469, and the People vs. Moore, 368 Ill. 455 at Page 457.

We find that the County Court did not have jurisdiction of the child, Katherine Mary Zelen in the dependency proceedings, and therefore, the plaintiff in error cannot be held in contempt of Court, as the order finding the said child dependent, is void. The order appealed from is reversed.

Reversed.

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UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

321 I.A. 416

At a term of the Appellate Court, begun and held at
Ottawa, on Tuesday, the 6th day of May, in the year of our
Lord one thousand nine hundred and forty-seven, within and
for the Second District of the State of Illinois:

Present -- Honorable FRED G. WOLFE, Presiding Justice
Honorable GEORGE W. BRISTOW, Justice
Honorable FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
EDWARD T. RYAN, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On MAY 9 1947
Modified
the Opinion of the Court was filed in the
Clerk's Office of said Court, in the words and figures follow-
ing, viz:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1946

The People of the State of
Illinois,

Plaintiff-Defendant in error,

vs.

Error to the County Court
of McHenry County

Paul Zeien,

Defendant- Plaintiff in error.

WOLFE, P. J.

In July 1945, the State's Attorney of McHenry County filed a petition in the County Court of said County, alleging that Paul Thomas Zeien was a dependent and neglected child under the age of seventeen years, residing at Huntley in said county; that Paul Zeien is the father of said child, and Marion Zeien, whose address is unknown, is the mother of the child; that the mother consents to have the child taken from her and placed for adoption; that the father, Paul Zeien, is an unfit person to have the care and custody of the child, and that it is for the best interest of said child, and the state, that he be taken from said Paul Zeien and placed under proper guardianship. Summons was ordered issued showing service on Paul Thomas Zeien and Paul Zeien on July 14, 1945. Marion Zeien was not served with summons.

On motion of C. Russell Allen, Assistant State's Attorney, leave was granted to the People to amend the petition to include Marion Pauline Zeien and Katherine Mary Zeien as dependent children under seventeen years of age, and that summons was issued against Paul Zeien in the matter of said dependency on July 18, 1945. No amendment was actually made, or amended petition filed. Hearings were had upon the petition, and the three children were found to be

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dependent children. Louise M. Brooks, the Probation Officer of McHenry County, was appointed guardian of said children, and she was given full charge of their care and support, placement and education, with power to consent to their adoption without notice to, or consent of the parents.

On November 19, 1945, Don A. Wicks, State's Attorney for McHenry County, filed a petition in said County Court stating that Paul Zeien, without the knowledge or consent of Louise M. Brooks, took Katherine Mary Zeien from the Industrial Training School, where she had been placed by her guardian, to Elgin, Illinois, where he kept her in defiance of the order of court. He prayed for a rule to show cause against Paul Zeien, as to why he should not be adjudged guilty of contempt of court.

Paul Zeien filed an answer and attempted to justify his actions and show why he was not guilty of contempt of court. He contended that the order entered July 16, 1945, finding the three children dependent and neglected children was void, and of no effect. He asked the court to vacate and set aside said order and that the three children be returned to his care. The court overruled his motion to vacate the order of July 16, 1945, declaring the three children dependent and neglected and found the appellant guilty of contempt of court, and fined him twenty-five dollars and costs. The fine and costs were paid. From the order of the court in refusing to set aside the finding of July 16, 1945, declaring the three children dependent and neglected children, Paul Zeien has brought the case to this court on a writ of error.)

It is insisted by the plaintiff in error that the proceedings in the County Court were void, because the mother of the children alleged to be dependent, was never properly served with a summons, as the statute in such cases provides. [It is conceded by the defendant in error, that the proceedings as to Marion Zeien is void, but claims that the court had jurisdiction of the children and the

dependent children. Louise M. Brown, the husband of Louise M. Brown, was appointed guardian of the children of Louise M. Brown, and was given full charge of their care and support, and was to provide for their education, with no fee to be paid to him for his services.

On November 10, 1934, the court, in its order, directed that the children be taken to the County Jail, and that they be kept there until further order of the court.

Without the knowledge or consent of Louise M. Brown, and without the knowledge of the court, the children were taken from the County Jail, and were placed in the home of Mary Jones, who was then residing at 1234 Main Street, in the City of Chicago, Illinois. The children were placed in the home of Mary Jones, and were kept there until further order of the court. The court, in its order, directed that the children be taken to the County Jail, and that they be kept there until further order of the court.

On July 10, 1934, the court, in its order, directed that the children be taken to the County Jail, and that they be kept there until further order of the court. The court, in its order, directed that the children be taken to the County Jail, and that they be kept there until further order of the court.

On July 10, 1934, the court, in its order, directed that the children be taken to the County Jail, and that they be kept there until further order of the court. The court, in its order, directed that the children be taken to the County Jail, and that they be kept there until further order of the court.

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It is stated by the plaintiff in error that the error in the County Court was void, because the action in the County Court was void, and was never properly served with a summons, as the statute in such cases provides. It is contended by the defendant in error, that the proceedings in the County Court are void, because the action in the County Court was void, and was never properly served with a summons, as the statute in such cases provides. It is contended by the defendant in error, that the proceedings in the County Court are void, because the action in the County Court was void, and was never properly served with a summons, as the statute in such cases provides.

plaintiff in error, and therefore is valid as to the plaintiff in error.

The statute provides in cases of this kind that both of the parents should be served with summons notifying them of the proceedings, and it is conceded in this case that the mother of the children was not served with summons, as provided by the statute. In the case of the People v. McDonald, 225 Ill. App. 447, the father of Charles McDonald, a child of 15 years of age, filed a petition in the County Court of Sangamon County, alleging that Charles McDonald was a delinquent child; that the child was in the custody of the sheriff of said county, and that Elizabeth McDonald was the mother of said child, living in Springfield, Illinois. Summons ~~was~~ ordered for W. McDonald, the father, but not for Elizabeth McDonald, the mother. A hearing was had upon the petition and Charles McDonald was found to be a delinquent child, and sentenced to St. Charles School for Boys.

Charles McDonald, by his next friend, (his father,) sued out a writ of error to the Appellate Court of the Third District. The Court, in passing upon the merits of the case, uses this language: "And it is urged, as a ground for reversal of the order, that no summons was issued or served upon Elizabeth McDonald, the mother of the alleged delinquent child. The statute requires that all persons named in the petition shall be made defendants, and shall be notified of such proceedings by summons. Chapter 23, section 4, Rev. St. (Cahill's Ill. St. ch. 23, Par. 322). The record does not show that any summons was issued or served upon the mother of the delinquent child, and, so far as the record shows, she had no notice of the proceedings. The issuance of a summons and service upon the defendant in proceedings of this character is jurisdictional. The proceedings is purely statutory, and all the requirements of the statute must be complied with to give the Court jurisdiction to enter final judgment. The mother of the child had a

right to be heard and contest at the hearing the entry of the order of committal. The judgment is therefore reversed and the cause remanded."

In the case of *The People vs. Lynch*, 223 Ill. Page 346, a similar question was before our own Supreme Court. In this case a habeas corpus proceeding was instituted to attack the validity of the County Court's action in not serving the mother of the defendant with summons in the dependency proceeding. On page 347 of the opinion, we find the following: "Among other things, the petition alleges that the proceedings under which Elizabeth was committed are void, because the petitioner, her mother, was not notified of the proceedings, as required by section 5 of the act in question. This section provides not only that a summons shall issue for the person having the custody or control of the child or with whom it may be, and served on such person at least twenty-four hours before such hearing, but that the parents of the child, or its legal guardian, or if there is neither or their residence is not known, some near relative, shall then be notified of the proceedings. Section 5 of this act clearly intends that the parents should have a reasonable notice of proceedings such as these, so that they could appear and be fully heard before they were deprived of the care and custody of the child. Manifestly, under this statute this hearing is not to be a mere perfunctory matter. While it may not be necessary to carry it on with all the formalities of an ordinary lawsuit, still the parents, and those who by nature are most deeply interested in the welfare of the child, must have amply opportunity to present all the facts. The home is the basis of our present civilization. The relations of parent and child are so important and sacred that they should not be interfered with or destroyed unless absolutely essential to the well being of society, and then only when the public authorities have been satisfied as to the necessity of such action after a full investigation and due notice to all interested parties. In the commitment of Elizabeth McEntee the record shows that the authorities not only failed to comply with the letter, but seemingly with the spirit, of the Juvenile Court law.

"Many other grounds are set forth why the finding of the trial court is void, but they will not require discussion in view of what has been said on the question of notice. No proper legal notice having been served upon the relatrix, the mother and legal guardian of Elizabeth McEntee, on the hearing before the juvenile court, the order of that court must be held void." It is our conclusion that the proceedings in the County Court in this case were a Nullity and void.

Another reason why the proceedings in the County Court were null and void, is because there was not a proper petition filed in that Court, alleging that Katherine Mary Zeien and Marion Pauline Zeien were dependent, or neglected children. The States Attorney asked leave to amend the original petition claiming that Marion Pauline and Katherine Mary Zeien were dependent and neglected children. The amendment was never made. Being granted leave to amend the petition does not constitute an amendment. Perhaps the leading case on this subject is W. C. R.R. Co. v. Wieczorek, 151 Ill. Page 579 at 583 we find the following: "On motion made by the defendant for non-suit, leave was asked by plaintiff to amend his declaration. The motion for non-suit was overruled, and the leave granted. The proposed amendment was not in fact made, and the declaration is presented, upon this record, without amendment, and in all respects as it was when the motion for non-suit was entered. True, leave was given to amend the declaration, and this leave, together with the words of the proposed amendment, and where to be placed in the pleading, is shown by the bill of exceptions, and while the Appellate Court saw fit to treat the leave given as amounting in effect to an amendment actually made, we do not feel at liberty to so regard it. If a party, for any reason, disregards the leave given by the trial court to amend his pleading, so as to make it correspond with the proofs, and omits, without justifiable cause, the due incorporation into the record of the amendment pursuant to the leave, this court,

sua sponte, has no authority to carry out the leave, make his amendment for him, interpolate it into the record, and thereby save him harmless of error assigned. After obtaining such leave, the plaintiff was in no wise obliged to exercise the privilege given and make the amendment, and until the amendment was in fact made, the declaration in all respects remained the same, as though no leave to amend it had been given. Ogden v. Town of Lake View, 121 Ill. 422." To the same effect is Burns vs. Kaylor, 264 Ill. App., 469, and the People vs. Moore, 368 Ill. 455 at Page 457.

(We find that the County Court did not have jurisdiction of the children, Paul Thomas Zeien, Katherine Mary Zeien, or Marion Pauline Zeien in the dependency proceeding. Therefore, the order finding ~~such~~ said children dependent and neglected children was void. The Court erred in not vacating the order entered July 16, 1945. The order of the County Court is hereby reversed.)

Reversed.

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STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
SECOND DISTRICT, }

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of May in the year of our Lord one thousand nine hundred and forty seven

Justus L. Johnson
Clerk of the Appellate Court.

abstract

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A. D. 1947

General No. 9529

Agenda No. 2

Henry E. Ayers, as Administrator
with the Will Annexed of the
Estate of John T. Ayers, Deceased,

~~Plaintiff-Petitioner,~~
Appellant,

-vs-

William R. Bach, William J. Bach,
and August Barth,

~~Defendants-Respondents.~~
Appellees.

~~Petition for leave to~~

*A*ppeal from the Circuit

Court of McLean County,

Illinois.

Dady, P. J.

In this proceeding in chancery the trial court sustained motions of defendants William R. Bach and William J. Bach to strike the amended complaint, and thereupon dismissed the suit for want of equity. The plaintiff brings this appeal.

The amended complaint, so far as is material, alleged the following:

John T. Ayers died on May 21, 1927, aged 75 years. His wife, Harriet A. Ayers, died on February 19, 1944, aged about 90 years. Neither had any business experience other than farming. John T. Ayers left a will which was admitted to probate on April 30, 1945. Plaintiff is Administrator with the Will annexed of the Estate of said John T. Ayers. By said will the testator devised and bequeathed his entire estate to Harriet A. Ayers.

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In 1922 John T. Ayers owned a farm of 205 acres which was encumbered with a mortgage of about \$26,680.00, and he was otherwise financially involved. He then employed the defendant William R. Bach as his attorney. On October 3, 1922, Bach, as such attorney, advised a plan whereby Bach agreed to act as attorney for Ayers and to advance moneys to pay the debts and obligations of Ayers. Pursuant to such plan Ayers and wife on October 3, 1922, conveyed said farm to Bach by quit-claim deed. Pursuant to such plan Bach prepared a written instrument dated October 11, 1922, which was executed by Bach and Ayers. The complaint set up said instrument in haec verba.

The instrument recited that whereas Ayers had been indebted on a claim of a named third party in the sum of \$70,000.00 and to Bach in the sum of \$5802.00 for moneys advanced by Bach to pay a certain judgment of one Edward F. Irving, and owed approximately \$26,680.00 on such mortgages, and whereas Bach had secured a settlement of said \$70,000.00 claim by paying \$2827.00 to one J. N. Hilton and securing releases and assignments, and had charged Ayers \$5500.00 for legal services in such settlement, and whereas Ayers and wife had conveyed to Bach such 205 acres in payment of such fees and services and money advanced by Bach, and whereas Bach agreed to pay interest on all mortgages and endeavor to refund same, and pay all taxes on said land,- it was therefore agreed that Bach would resell said land at public or private sale, if he could do so, on or before March 1, 1924, and not later than March 1, 1925, at option of Bach, and after deducting all monies advanced and fees earned and interest at 7% per annum, and after crediting any monies received from Ayers and rents that Bach might receive, Bach would

divide the surplus, if any, equally between Bach and Ayers. "The present value of said land being figured at \$250.00 per acre."

The instrument then stated that Bach agreed to allow Ayers to farm said land and pay Bach an annual rent of not less than \$1400.00 for the year 1923 and not less than \$700.00 for the year 1922, "and such sum for the year 1924"; that in the event Bach extended the time for an additional year, then at such rent as might be agreed on; that Ayers might repurchase said lands "before same are sold to others," by paying Bach "his fees and all monies and interest and his half of the surplus;" that Bach "may retain said lands at his option upon paying" Ayers his one-half of the surplus, "as determined above."

The instrument then stated that "the price to be figured on said land, if so taken over, to be either an agreed price between the parties or by three disinterested appraisers, one to be selected by each party, the third to be selected by the other two," Bach "to determine whether he will keep the said land at such price or to resell the same under the contract."

The instrument then stated that Ayers, without exense to Bach, would see to the collection of rents from subtenants, keep the buildings insured and keep up ordinary repairs, and see that the farm was properly cared for.

Such complaint further alleged that by reason of such facts the conveyance of October 3, 1922, was not absolute, but was in trust for the benefit of John T. Ayers, and that William A. Bach held the title to said land as trustee; that said William A. Bach, in spite of the fiduciary relationship, exacted from Ayers an agreement as to the amount of compensation and for interest that

was excessive; that John T. Ayers was in possession of the land on October 3, 1922, and thereafter remained in possession jointly with William R. Bach until a short time before the death of John T. Ayers, and during such time John T. Ayers fully performed all his undertakings under said agreement of October 11, 1922; that after the death of John T. Ayers said William R. Bach continued in possession of said premises (except as to a part thereof sold to August Barth in 1943 as hereafter stated) for the joint use of himself and Harriet A. Ayers, and received the income from said premises, and continued to recognize the existence and continuance of said trust in favor of Harriet A. Ayers; that from the time of the death of said John T. Ayers until her said death said Harriet A. Ayers was feeble mentally and physically and incapable of transacting business of any kind, and was not aware that William R. Bach had converted any of said land to his own use; that said William R. Bach did not effect a sale of said land by March 1, 1925, did not elect to retain said land at his option by paying John T. Ayers one-half of any surplus in the manner so agreed upon, did not appoint any appraiser for the appraisal of said land or offer or attempt to have the same appraised, and did not make any accounting to said John T. Ayers; that said William R. Bach has never denied or repudiated said trust and has never denied the right of John T. Ayers or Harriet A. Ayers to an accounting, but evaded an accounting by falsely representing to them that the land had shrunk in value and that the indebtedness to him and his disbursements under said instrument in writing were greatly in excess of the amount for which the land could be sold, which false representations were believed and relied on by John T. Ayers and Harriet A. Ayers;

that on October 11, 1922, said land was worth more than \$250.00 per acre; that at the time of the commencement of this suit the value of said land was greatly in excess of \$250.00 per acre; that in 1933 William R. Bach conveyed said 205 acres to his son William J. Bach, a lawyer, who at that time was associated with William R. Bach in the practice of law, and who was fully cognizant and aware of the rights of said John T. Ayers and Harriet A. Ayers under and by virtue of the terms of said contract dated October 11, 1922; that said conveyance from William R. Bach to William J. Bach was colorable only and without consideration; that William J. Bach since 1933 has held title to all of said land, except about 119 described acres thereof which he conveyed in 1943 to August Barth; that neither William R. Bach nor William J. Bach had any accounting with Harriet A. Ayers on account of said sale; that August Barth has obligated himself to pay William R. Bach and William J. Bach moneys on notes as part payment of the purchase price of the land so conveyed to August Barth; that the agreement of October 11, 1922, for one-half interest in the surplus from the sale of said lands, in addition to interest charged on advances, was excessive, fraudulent and void; that the attorney's fees of \$3500.00 were excessive and should not be allowed, and that plaintiff is informed and believes and charges that William R. Bach did not pay the full sum of \$5,802.00 to Edward P. Irving, and did not pay the full sum of \$2,827.00 to J. N. Hilton, as set forth in said agreement of October 11, 1922.

The amended complaint made William R. Bach, William J. Bach and August Barth parties defendant and asked that William R. Bach and William J. Bach be required to make a full and complete accounting of all receipts and expenditures by them; that the attorney's fees so charged be declared excessive; that William R. Bach be required to show the amount of actual payments made by him on behalf of John T. Ayers; that August Barth be required to make known and discover the purchase price of the real estate purchased by him, together with the amount paid on account thereof and the balance, if any, due thereon; that plaintiff have a money decree for the amount due from the defendants William R. Bach and William J. Bach, that the real estate be sold pursuant to order of court, and that after satisfying the amounts found due to William R. Bach and William J. Bach the surplus be paid to the plaintiff. The complaint also asked for general relief.

Defendants William R. Bach and William J. Bach contend that the amended complaint fails to make out a case in law or equity, that the agreement of October 11, 1922, did not create a trust, and that the plaintiff has been guilty of such laches as to prevent a recovery.

Evidently the quit-claim deed was drafted by William R. Bach. Such deed was delivered to him and the agreement of October 11, 1922, was drafted and executed by him at a time when he was acting in a fiduciary capacity, and pursuant to a plan originated and advised by him as attorney for John T. Ayers. While the conveyance by quit-claim deed from John T. Ayers and Harriet A. Ayers to William R. Bach was absolute in form, it is our opinion that such deed and the agreement dated October 11, 1922, must be read and construed together as one instrument. So read and construed,

it is our opinion that on the admitted facts well pleaded the conveyance in question was made upon the express trust set forth in the agreement of October 11, 1922, for the benefit of John T. Ayers and William R. Bach. The complaint alleges and the motions to strike admit that the conveyance from William R. Bach to William J. Bach was without consideration and with full knowledge on the part of William J. Bach of the rights of John T. Ayers and Harriet A. Ayers. Therefore William J. Bach is in no better position than William R. Bach. It is therefore our opinion that the amended complaint clearly sets forth a cause of action which, if proven, requires William R. Bach and William J. Bach to execute such trust and make a full accounting in this proceeding.

In Reynolds v. Sumner, 126 Ill. 58, 70, the court said: "The Statute of Limitations, and the laches of Reynolds in his lifetime, are relied upon as a bar to the relief sought. * * * The rule seems to be well settled, in cases of express trust, that mere delay will not defeat a recovery, unless the trustee has repudiated or disavowed the trust, and the disavowal is known to the cestui que trust." In Elmore v. Johnson, 143 Ill. 513, 533, the court said: "Where bills are filed to set aside contracts or deeds between parties standing in a confidential relation to each other, the defense of laches is not usually regarded with favor. It has been said that 'length of time weighs less in such a case than in any other,' and that it is 'extremely difficult for a confidential agent to set up an available defense grounded on the laches of his employer'." In Speidel v. Henrici, 120 U.S. 377, the court said: "As a general rule, doubtless, length of time is no bar to a trust clearly established,

and express trusts are not within the Statute of Limitations, because the possession of the trustee is presumed to be the possession of his cestui que trust."

It is our opinion that on the admitted facts plaintiff has not been guilty of such laches as to prevent a recovery.

Therefore the trial court erred in sustaining the motions to strike and in entering an order dismissing the complaint.

The judgment of the trial court is reversed and the cause is remanded with directions to deny the motions to strike, to require the defendants to answer, and for further proceedings consistent with this opinion.

Reversed and remanded with directions.

3314.A. 117

Gen. No. 10115.

Agenda No. 22.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
FEBRUARY TERM, A. D. 1947.

IN RE JUDITH MARIE MORRIS, a Minor,

LOUISE BROOKS, Probation Officer Mc-
Henry County
Petitioner, Defendant in
error.

and

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in error.

vs.

ELEANOR MORRIS
Respondent, Plaintiff
in Error.

Writ of Error To
County Court of
McHenry County.

WOLFE,-- P. J.

Louise Brooks, as Probation Officer of the County Court of McHenry County, filed a petition in said Court charging that Judith Marie Morris, age four years, was a dependent and neglected child residing in McHenry County; that the child was in the custody of Cecil Hunter; that Eleanor Morris was the mother and Dennis J. Morris was the father of said child. The record shows that said petition was filed by Eckert & Eckert, Attorneys at Law, representing Louise Brooks, the petitioner. A summons was served on Eleanor Morris.

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Cecil Hunter, and Dennis J. Morris entered their appearance and consented to an immediate hearing on the petition. The petition was filed on April 17, 1946. A hearing was had on April 29, 1946, and later an order was signed finding that said Judith Marie Morris was a dependent and neglected child; that the parents of the child are unfit and not suitable and proper persons to have the care and custody of said child, and they are unable, or unwilling to care for her. Louise Brooks was appointed guardian of the child, and is authorized without any further order of Court, to appear in any Court where any proceeding for the adoption of said child may be pending, and consent to such adoption, without any further notice to, or consent by the parents, or relative of said child. From this order, Eleanor Morris, the mother of said child, has brought the case to this Court on a writ of error.

The evidence shows the child, Judith Marie Morris, was brought to the home of Cecil Hunter in Woodstock, Illinois; that the child was placed with Mrs. Hunter about Jan. 1, 1944, and the mother of the child agreed to pay Mrs. Hunter for the care of the child, \$14.00 per week. For awhile the payments were made fairly regularly, but later Mrs. Morris became delinquent in her payments, and at the time of the hearing, was in arrears in the amount of about \$390.00.

The evidence further shows that the Morrises were married, and had two other children older than Judith Marie; that in October 1941, Mrs. Morris filed a suit for separate maintenance against her husband in Cook County, and the father was ordered to pay \$11.00 per week for the mother, and the then, two children's support. In November 1944, the suit was changed from separate maintenance to

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divorce. Later, there was an amended complaint filed, and in March 1945, a decree of divorce was granted to Mrs. Morris because of her husband's extreme and repeated cruelty towards her.

Mrs. Cecil Hunter testified as to the child being brought to her home in January 1944; that she had taken good care of the child ever since; that at the time the child was brought to her, she was in poor physical condition, but she has cared for her and now she seems to be a perfectly healthy normal child.

Louise Brooks testified in answer to a question propounded to her by Mr. Floyd B. Eckert, one of her attorneys. "Have you ever had occasion to see the nature of the care this child has had, during the time it has been in Mrs. Hunter's care and custody?" "I say from the point of having the child left with her?" Answer, "Yes, I have; Mrs. Hunter is, well, I would call her the most perfect mother there is in the care and affection of children as probation officer of this County." "As an individual, you have no fault to find with the care and treatment the child has received in the hands of Mrs. Hunter?" "None whatever." Nelson Bullis testified to the good care the Hunters were giving Judith Marie and ended his testimony with saying, "The Hunters love that baby."

It is insisted by the plaintiff in error that the evidence in this case wholly fails to sustain the Court's order in finding that Judith Marie Morris was a dependent and neglected child. It is also contended that the mother of said child and Judith Marie Morris did not have a fair and impartial trial; that the States Attorney of McHenry County, whose duty it is to conduct the hearing in such cases, took a very minor part, and that the petition was filed by paid attorneys representing the petitioner, Louise Brooks, who conducted practically the entire hearing of the case.

After the hearing had progressed and Dennis J. Morris had denied being the father of Judith Marie Morris, leave was granted to amend the petition by charging that the parents of the said child were unfit and improper persons to care for the said Judith Marie Morris. The amendment was made, and an answer filed by Eleanor Morris.

Louise Brooks testified that she went to Chicago and investigated where Mrs. Morris had been employed, and what she had earned in the past year. Over objection she was permitted to state what her investigations show. While we think this evidence was immaterial, under the issues in the case, it certainly was not the proper way to prove that Eleanor Morris had misrepresented what her earnings had been. This question was propounded by Mr. Eckert to the witness: "Have you made any investigation, Mrs. Brooks, with reference to the fitness and character of Eleanor Morris, mother of Judith Morris, based upon the fitness, as a mother of such child?" She answered that she had. After more questions were propounded, Louise Brooks was asked, "Now, my question, specifically was with regard to Mrs. Morris, and I would like to have you give to the Court what information, if any, you found that bears on her fitness, her character." This was objected to, but overruled. Then the following occurred: "With whom did you talk, with regard to the fitness of Mrs. Morris as a mother?" "Well, I talked to this Mr. Kremshaw." "Now, did you talk with any one else at the Posey Barber Shop in Chicago?" "Now, did you talk with any one else?" "Of course, you talked with her husband?" "I talked with her husband, yes." "Any one else, or was that all?" "As I recall now, that was all." Over objection to whom Louise Brooks had consulted, she stated: "There was a Mrs. Johnson," that the best address that she could give of the woman

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was: "She lives on the south side around 6100 or 6300." After Mr. Eckert had concluded his examination of Louise Brooks, there was no cross-examination by plaintiff in error's attorney, but Mr. C. Russell Allen the Assistant States Attorney, was permitted to cross-examine Louise Brooks. Mr. Allen's first question was: "Is that what you testified to, is that the only and all of the investigation you made as to the character and fitness of Mrs. Morris, to have the care and custody and control of her child?" Answer, "Well, there was some other things, but I have no one to prove them." "What were some of these other things?" "Well, she was seen in the early hours of the morning in a tavern drinking when her child was out here." "Do you know who saw her?" "Yes." "Who?" "The night policeman." "Night policeman,-- where?" "In Chicago." "Do you know his name?" "I did not know his name." "Have you a record of his name somewhere?" "Well, I had." "Do you know out of what station he is working?" "Working for a private concern." "Private detective agency?" "Well, private watchman for a private company." "What do you mean, private watchman?" "For a private company, he was a watchman for this company." "Watchman for a manufacturing company?" "I think it was a manufacturing Company." "And whereabouts do you know she was seen in Chicago?" "It was way out on the south side." "In some tavern?" "Yes." "Did you say the early hours of the morning?" "How early?" "I think he said 4:30; I think it was." "When did you make this investigation, Mrs. Brooks?" "At the same time I made the other investigation." "Was that week before last?" "Yes." "Did you go to Chicago?" "I did." "And you made this investigation personally?" "I did." "And did you talk to this party who was the watchman?" "I did not." "Did you make any other investigation?" "I don't recall anything further."

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Margaret C. Lyman, a social worker of Chicago, was called as a witness on behalf of Mrs. Morris, and on the question being asked her, "Do you know her, Mrs. Morris's reputation in the community where she lives, as to decency and character?" She was not permitted to testify in regard to this matter. Ruth Hultsch, the former landlady of the Morris, stated that she knew the reputation of Mrs. Morris in the neighborhood in which she lives, but the Court refused to let her state what that reputation is.

The attorneys representing Louise Brooks introduced in evidence a certified copy of the petition, answer and decree of divorce to Eleanor Morris, from Dennis J. Morris. Paragraph 4A of the petition is as follows: "That there were three children born to the parties hereto, as a result of said marriage; namely, Margaret Ann, now four years old, Paul T. Morris, now three and one-half years old, and Judith two and one-half years old, who are now in the care and custody of the plaintiff." This petition was sworn to. The answer of the defendant, Dennis J. Morris, recites the following: Par. 1, "That he admits the allegation contained in Paragraphs 1, 2, 3 and 4A of the plaintiff's second amended bill for a divorce. This answer contains the following verification: "Dennis J. Morris, being first duly sworn upon oath, deposes and says that he is the defendant in the above entitled cause; that he has read the above and foregoing answer to second amended bill for divorce by him subscribed, knows the contents thereof, and the statements contained therein, are true in substance and in fact.

Signed, Dennis J. Morris."

It is hard to conceive that the trial court would permit the hearsay evidence that was offered by Louise Brooks as blackening

the character of the mother of said child, and then not permit Mrs. Morris to introduce what we consider proper evidence to show good character of this mother who was fighting for the custody of her baby girl. The father of the child certainly has been impeached by the record in this case, when he admitted that the child was his in the divorce proceeding.

While Ruth Hultsch was testifying, there was a great deal of bickering back and forth between the attorneys. Mr. Allen, the states attorney, seemed to be more active in examining Mrs. Hultsch than any other witness. Mrs. Hultsch testified that Mrs. Morris was a tenant of hers for about a year and when she was asked: "Did she stay close to home?" She answered, "She did." Mr. Eckert objected to the question when Mr. Allen exclaimed: "The State would like to get in on that kill too." Just what was meant by Mr. Allen's exclamation, it is hard to conjecture, but it certainly did not have much bearing on whether Judith Marie Morris was a dependent and neglected child.

In the recent case of *The People of the State of Illinois et al., vs. Lucy Hinton, et al.*, 530 Ill. App. 150, the case was prosecuted by private attorneys and in discussing the matter, we find this language: "This being a people's case it should properly have been carried on by the State's Attorney of the county in an impartial manner and not turned over to a special prosecutor. Although the law permits under certain circumstances the hiring of additional counsel to aid the prosecutor, this is always done at the discretion of the trial court and it is the duty of the trial court to see that no injustice is done. In this case the court did not exercise sound discretion in allowing

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the special attorney to carry on the proceedings as they were carried on, and allow the case to be used as an opening wedge for divorce. The error was sufficient in nature as to cause a reversal.

"At the time petition was filed, petitioner had exclusive control of Valeric, who had been in his custody for weeks before. The allegation contained in the petition that she was then a neglected and dependent child in the county of Adams was false and a fraud, and if the State's Attorney had acted as a quasi judicial officer and examined the merits of the case a petition would never have been filed under the circumstances here. It is the duty of the prosecutor to protect the defendant and see that law and justice is done as much as it is to enforce the law." Since the hearing in the County Court two more attorneys have been added to help in the prosecution of this suit.

What is said in the Hinton case applies with special significance to the manner the present case was conducted. It is our conclusion that the Court erred in finding that Judith Marie Morris was a dependent and neglected child, as contemplated in the Statute. The evidence, without any contradiction shows that the child was well cared for, but on account of sickness and ill health, the mother was unable to pay the agreed price for the child. Any neglect of the mother to visit the child, in no way detracted from the child being well cared for, since she had the same loving care from Mrs. Hunter that she would have had, if the mother had not been in arrears on the agreed weekly payment for her care and custody.

We therefore hold that the plaintiff in error, Eleanor Morris, and the child, Judith Marie Morris, did not have a fair and impartial trial, and the order of the Court finding Judith Marie Morris a dependent and neglected child, is not sustained by the weight of the evidence. The order of the county court is hereby reversed and

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remanded with directions to dismiss the petition.

Reversed and remanded with directions
to dismiss the petition.

Abstract

Gen. No. 10008

Agenda No. 17

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY 17
TERMINAL TERM, A. D. 1942

PEOPLE OF THE STATE
OF ILLINOIS,
Defendants in Error

vs.
JOHN BOYDEN,
Plaintiff in Error.

331 I.A. 418
ERROR TO THE COUNTY COURT
OF WILL COUNTY.

Per Curiam:

On February 9, 1942 upon leave granted by the judge of the County Court of Will County, the States Attorney of that county filed an information in that court charging plaintiff in Error, John Boyden, hereinafter referred to as the defendant, with violating on July 25, 1941, section 16 of the act to regulate the practice of dental surgery and dentistry. The information also alleged: "that there was duly filed in the municipal court of Chicago, County of Cook and State of Illinois, on, to-wit, the 9th day of May in the year of our Lord One Thousand Nine Hundred and Thirty, a certain Information wherein one John Boyden was charged with violation of the Medical Practice Act of Illinois, which said information was in words and figures as follows:

"State of Illinois)
County of Cook,)ss
City of Chicago)

In The Municipal Court of Chicago.

Dell Mathews, a resident of the City of Chicago in the State aforesaid, in his own proper person, comes now here into court, and in the name and by the authority of the people of the State of Illinois, gives the Court to be informed and understood that John Boyden heretofore, to-wit: On the 25th day of June, A. D. 1929 at the City of Chicago, aforesaid Then and there not possessing in full force and effect a valid and existing license to practice dentistry or dental surgery in the State of Illinois, did then and there unlawfully represent himself as being able to diagnose and treat any disease, pain, injury, deficiency, deformity or physical condition of the human teeth, and did then and there unlawfully and wilfully take impressions of the teeth or jaws of Mrs. Vernon Carrington, and did ~~xxx~~ then and there fit a plate on the jaws of the said Mrs. Vernon Carrington, and for said diagnosis and treatment did demand ^{and} receive a fee of fifty dollars (\$50.00) from the said Mrs. Vernon Carrington--In violation of the Dental Practice Act contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

DELL MATHEWS.

State of Illinois)
County of Cook)ss
City of Chicago)

Dell Mathews, being first duly sworn, on his oath, deposes and says that he resides at 3513 Indiana Ave., Chicago, Illinois, that he has read the foregoing information by him subscribed and that the same is true.

DELL MATHEWS.

Subscribed and sworn to before me this 8 day of May A.D. 1930.

James A. Kearns.
Clerk of the Municipal Court
of Chicago.

"I have examined the above information and the person presenting the same and have heard evidence thereon, and am satisfied that there is probable cause for filing same. Leave is given to file said information and IT IS ORDERED that a capias issue against the accused. Bail fixed at \$1,000.00 or cash deposit of \$100.00.

W. E. Viner.
Judge of the Municipal Court
of Chicago."

The instant information then alleged that such proceedings were had in due form of law in said municipal court; that the said defendant, John Boyden, was duly adjudged guilty of the criminal offense of violation of the Medical Practice Act of

[illegible]

Illinois and sentenced to pay to the Clerk of the Municipal Court of Chicago a fine of \$50.00. That subsequently said fine was paid and that by reason of the foregoing the said John Boyden, there stood and now stands, convicted of practicing dentistry in this state without a license in violation of the Medical Practice Act of Illinois, which judgment of conviction is now final. The instant Information then alleged that the John Boyden, defendant in the Information filed in the Municipal Court and convicted as aforesaid was the same person who is the defendant in this proceeding and that on July 25, 1941, at and within the County of Will in the State of Illinois, not then and there possessing a license to practice dentistry or dental surgery issued by the authority of the State of Illinois, did then and there unlawfully practice dentistry without a license by taking an impression of the teeth or jaws of one Edward Russell.

The issues made by defendant's plea of not guilty were submitted to a jury resulting in a verdict of guilty upon which judgment was rendered, after over-ruling defendant's motions for a new trial and in arrest of judgment, and defendant was sentenced to jail for six months and to pay a fine of \$1000.00. To reverse the judgment defendant prosecuted a writ of error directly to the Supreme Court insisting that the information was verified by a person who had no knowledge of the existence of the facts alleged and that therefore the warrant issued thereon was not based upon proper cause which was a violation of his constitutional rights. This contention is settled by the opinion transferring this cause to this court. (People of the State of Illinois v. Boyden, 385 Ill. 521.)

Defendant argues for reversal that the information is

fatally defective as it fails to negative the exceptions of the statute, upon which the charge is based, citing in support of this proposition such cases as *People v. Barnes*, 314 Ill. 140; *People v. Lewis*, 319 Ill. 154 and *People ex rel. v. Prystalski*, 358 Ill. 198. However, with respect to this contention, it will be found that when the exception is not a part of the description of the offense, and merely withdraws certain acts from the operation of the statute, it need not be negatived and its position in the act is of no consequence. *People v. Green*, 362 Ill. 171, 175; *People v. Talbot*, 322 Ill. 416, 419, 420. This rule is observed in the case of *People v. Prystalski*, 358 Ill. 198, cited by plaintiff in error. On page 204 of the opinion in that case, with respect to this rule, it is said: "On the other hand, if the exception, instead of being a part of the description of the offense, merely withdraws certain acts or certain persons from the operation of the statute, it need not be negatived, and its position in the act, whether in the same section or another part of the act, is of no consequence." This is the situation with respect to the statute here involved.

Defendant also objects to several of the People's given instructions, particularly instruction eight. This instruction advised the jury that it was not incumbent upon the People to prove that part of the charge in the information which alleged the defendant did not have a license to practice dentistry in this state. It is urged that this was prejudicial error, as it in effect tended to shift the burden of proving the guilt of the defendant, and that it was not incumbent upon a defendant in a criminal case to establish his innocence. This question has been before the Supreme Court and there decided adversely to the contention of the defendant. *People v. Paderewski*, 373 Ill. 197; *People v.*

Frankowsky, 371 Ill. 493. That counsel for defendant recognized this as the law is evidenced by instructions 7 and 12 which he tendered and which the court gave which told the jury that "the issue in this case is whether or not the defendant, John Boyden, took an impression of the teeth or gums of one Edward Russell as charged in the Information." The defendant tendered and the court gave thirteen instructions in his behalf and a like number for the People. While some of the instructions have been criticized we do not feel that any of them require a reversal of this judgment.

It is seriously contended by the defendant that the Information does not charge him with being previously convicted of any offense prohibited by the Dental Practice Act but did charge him with a prior violation of the Medical Practice Act and that therefore his motion to quash that portion of the Information should have been sustained. We have set forth quite fully this part of the instant Information. It is there alleged prior to setting forth the Municipal Court Information in haec verba that (referring to the Municipal Court Information) this defendant was therein charged with violating the Medical Practice Act and after setting out the Municipal Court Information alleges that such proceedings were had in that court resulting in the defendant being adjudged guilty of the criminal offense of violation of the Medical Practice Act. A reading of the entire Information, however, discloses that defendant was previously convicted of violating the Dental Practice Act. The instant Information set forth in haec verba the Information filed in the Municipal Court. That Information charged in no uncertain terms that defendant on June 25, 1929, at Chicago, Illinois, then and there, not possessing a valid and existing

license to practice dentistry or dental surgery in Illinois did unlawfully and wilfully take impressions of the teeth or jaws of Mrs. Vernon Carrington, and did then and there fit a plate on the jaws of Mrs. Vernon Carrington and for said diagnosis and treatment did demand and receive a fee from her in violation of the Dental Practice Act, contrary to the form of the statute in such case made and provided. The instant Information also charges that the fine imposed by the Municipal Court of Chicago was paid and concludes that by reason of the foregoing the said defendant there stood and now stands convicted of practicing dentistry in this State without a license for that purpose.

The only charge set forth in the Municipal Court Information was that the defendant unlawfully and wilfully took impressions of the jaws and teeth of Mrs. Carrington and fit a plate in her jaws and for that received a fee of \$50.00 and concluded that such acts were in violation of the Dental Practice Act. Although the Dental Practice Act and the Medical Practice Act are found in the same chapter of our revised statutes they are separate and distinct acts and while the instant Information is subject to criticism, it does, in our opinion charge the defendant with a prior conviction of the Dental Practice Act and the trial court did not err in refusing to quash the Information or to arrest the judgment of conviction.

We have considered the other objections raised but do not find that any of them constitute reversible error. It appears the defendant had a fair trial; that the jury found against him on the facts; that the verdict is duly supported by the evidence, and that no errors of law appear which would reasonably affect

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the result. This is all that is required. People v. Bardell,
388 Ill. 482, 486.

The judgment is therefore affirmed.

Judgment affirmed.

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331 Ill. App.

331 Ill. App. 18

GEN. NO. 10008

AGENDA NO. 6

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1945.

PEOPLE OF THE STATE

OF ILLINOIS,

DEFENDANT IN ERROR,

vs.

JOHN BOYDEN,

PLAINTIFF IN ERROR.

ERROR TO THE COUNTY

COURT OF WILL COUNTY.

HUFFMAN, J.

Plaintiff in Error was convicted in the County Court of Will County, upon information charging him with violation of the Dental Practice Act. The information charged a prior conviction of said offense in the Municipal Court of Chicago. The defendant below prosecuted writ of error directly to the Supreme Court, charging that the information was verified by a person who had no knowledge of the existence of the facts charged; that therefore, the warrant issued thereon was not based upon proper cause; and that this was a violation of his constitutional guaranty,

as set out by Section 6 of Article II, of the Constitution. This point is settled by opinion transferring the cause to this court (385 Ill. 521).

Plaintiff in Error argues other points for reversal. Among these is one urging that the information is fatally defective as it fails to negative the exceptions of the statute, upon which the charge is based, citing in support of this proposition, such cases as *People v. Barnes*, 314 Ill. 140; *People v. Lewis*, 319 Ill. 154; and *People ex rel, v. Prystalski*, 358 Ill. 198. However, with respect to this contention, it will be found that when the exception is not a part of the description of the offense, and merely withdraws certain acts from the operation of the statute, it need not be negatived, and its position in the act is of no consequence. *People v. Green*, 362 Ill. 171, 175; *People v. Talbot*, 322 Ill. 416, 419, 420. This rule is observed in the case of *People v. Prystalski*, 358 Ill. 198, cited by Plaintiff in Error. On page 204 of the opinion in that case, with respect to this rule, it is said: "On the other hand, if the exception, instead of being a part of the description of the offense, merely withdraws certain acts or certain persons from the operation of the statute, it need not be negatived, and its position in the act, whether in the same section or another part of the act, is of no consequence." This is the situation with respect to the statute here involved.

Plaintiff in Error makes objection to People's given instruction eight. This instruction advised the jury that

it was not incumbent upon the People to prove that part of the charge in the information which alleged the defendant did not have a license to practice dentistry in this state. It is urged that this was prejudicial error, as it in effect tended to shift the burden of proving the guilt of the defendant, and that it was not incumbent upon a defendant in a criminal case to establish his innocence. This question has been before the Supreme Court, and there decided adversely to the contention of Plaintiff in Error. *People v. Paderewski*, 373 Ill. 197; *People v. Frankowsky*, 371 Ill. 493.

We have considered the other objections raised but do not find that any of them constitute reversible error. It appears the defendant had a fair trial; that the jury found against him on the facts; that the verdict is duly supported by the evidence; and that no errors of law appear which would reasonably affect the result. This is all that is required. *People v. Bardell*, 333 Ill. 482, 486.

The judgment is therefore affirmed.

Judgment affirmed.

Agenda No. 1.

331 I.A. 508

Appeal from
Circuit Court
of Lake County.

Sometime in the early part of the year 1930, the brothers, Emanuel Schwartz and William Schwartz, as partners under the name of E. Schwartz & Company, were engaged in the business of selling real estate, general insurance and making real estate mortgage loans, in the City of Waukegan, Illinois, determined to dissolve the partnership. Emanuel owned a two-thirds interest in the partnership and William, one-third. Broadly stated, their plan of dissolution was that William would purchase the interest of Emanuel; and Emanuel would cease doing business as an insurance agent and mortgage broker in Waukegan and North Chicago, for a period of ten years, but he was to be allowed to make loans on real estate mortgages with his own money.

1. The first part of the document is a list of the names of the persons who have been appointed to the various offices of the city.

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18. The eighteenth part of the document is a list of the names of the persons who have been appointed to the various offices of the city.

19. The nineteenth part of the document is a list of the names of the persons who have been appointed to the various offices of the city.

20. The twentieth part of the document is a list of the names of the persons who have been appointed to the various offices of the city.

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The assets of the partnership, exclusive of a bank deposit, (which is not involved in the present suit,) consisted of good will and first and second mortgages on improved real estate located in Waukegan and North Chicago. After making an inventory of the mortgages and estimating the value of the good will, the partners agreed that Emanuel's interest amounted to the sum of \$336,641.02. For Emanuel's interest, William was to give Emanuel six judgment notes aggregating \$119,328.08. These notes matured annually, the last being due on March 1, 1934. Emanuel was to select mortgages owned by the partnership, with accrued interest thereon, to the amount of \$217,312.94, which was the balance of the purchase price of Emanuel's interest in the partnership.

The negotiations concerning the terms of the dissolution of the partnership having been completed during the month of February, the partners entered into a written contract, under seal, which they dated February 1, 1929, containing the terms and conditions of the sale of Emanuel's interest in the partnership.

In the contract Emanuel is designated as the party of the first part, and William as the party of the second part. Provisions of the contract are as follows:--

"It is understood that the party of the first part has from time to time purchased loans of the said firm of E. Schwartz & Co., for investment of his personal funds, from which transactions the said firm of E. Schwartz & Co., have secured profits of various natures, and it is understood and agreed in consideration thereof, that in the event that there is a loss to the party of the first part resulting from the said loans so purchased, the party of the second part hereby agrees to promptly reimburse the party of the

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first part for one-third of the said loss, if any, or the party of the second part may have the option of purchasing any such loan in which default in interest and principal payments may exist, or in which there is a default under the terms of the said loan; the said purchase by the party of the second part of any loan as described above, shall be without loss to the party of the first part.

"The party of the first part agrees to accept mortgage loans and accrued interest now owned by the said firm in an amount equal to Two Hundred Seventeen Thousand Three Hundred Twelve and 94/100 Dollars; the party of the first part is to have the option of making his own selection of the said loans and accrued interest for a total amount of Two Hundred Seventeen Thousand and Three Hundred Twelve and 94/100 Dollars as herein provided; the party of the second part hereby agrees to collect the interest and principal payments on the said loans without compensation whenever the same becomes due and to provide for the payment of such taxes as may be in default in connection with the property securing the payment of said loans; in the event that there is a loss to the party of the first part resulting from said loans herein purchased, the party of the second part hereby agrees to promptly reimburse the party of the first part for one-third of the said loss, if any, or the party of the second part may have the option of purchasing any such loans in which a default in interest or principal payment may exist, or in which there is a default under the terms of the said loan; the said purchase of any loan by the said party of the second part shall be without loss to the party of the first part."

When the partnership was dissolved Emanuel owned a four-ninths interest in the Coon Building, William, two-ninths and their

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brother, Jacob Schwartz, three-ninths. Emanuel owned a two-thirds interest in the Yager Building, William, one-third. They were the owners of the National Variety Stores, Inc. Emanuel owned two-thirds of the shares of the capital stock thereof, and William, one-third. The office of the partnership was located in the Coon Building and, (as nearly as can be ascertained from the testimony in this case,) until in July, 1930, Emanuel used part of the office space for his own business and assisted William in carrying on the former business of the partnership. The personal interests of the brothers, Emanuel and William, were by the contract of dissolution excluded as assets of the partnership.

Other provisions of the contract of dissolution are as follows "In consideration of the agreements herein contained, the party of second part hereby agrees without further compensation to manage the real estate holdings owned jointly by the party of the first part, and the party of the second part, and account for to the party of the first part from time to time, as requested, of the receipts and disbursements of the real estate holdings.

"The party of the second part hereby agrees to arrange for the release of the liabilities of the party of the first part in a Guarantee Agreement on mortgage loans in favor of the Chicago Title and Trust Company, and will assume any and all liability of the said party of the first part by reason of said Guarantee Agreement to the Chicago Title & Trust Company dated March 21st, 1927.

"It is understood that the said assets of the said firm as purchased by the said party of the second part, shall be based upon the total amount of the assets of the said firm, as of February 1st, 1929, less the liabilities of every name and nature of said firm, which liabilities the said purchaser herein assumes and agrees to pay

as part of the consideration herein.

"It is understood that the party of the first part is now negotiating on a number of business propositions in connection with the business described herein, and it is understood and agreed that the said party of the first part shall have the option of completing said transactions. In the event that the said transactions are completed, the said party of the first part shall receive two-thirds of the profit thereof, and the party of the second part shall receive one-third of said profit."

At the time of the dissolution of the partnership, the firm owned first mortgages and many second mortgages. Emanuel selected first mortgages and a large number of second mortgages in total face amount, with accrued interest, equivalent to the balance of \$217,312.94 of the purchase price of his two-thirds interest in the partnership. The mortgages were left in the possession of William, and Emanuel was given a list, or register, of the mortgages. Sometime in July, 1930, the brothers had a violent quarrel and thereafter Emanuel had possession of the mortgages. After the quarrel, Emanuel had an office adjoining William's office in the Coon Building. Ill feeling between the brothers continued and grew bitter, and relentless. Their testimony on many of the material issues in the case now before us is in hopeless conflict. They have not been on speaking terms since the quarrel and their business dealings arising out of the dissolution contract have been carried on through correspondence, or by their attorneys.

It appears from the record that in the early part of November, 1930, William and his attorney conferred with the attorney for Emanuel who had a list of his claims against William. A list of William's claims against Emanuel was left with his attorney. This attempt to adjust the financial difficulties between the brothers failed, as have

other endeavors of attorneys, relatives and friends to reconcile them. Emanuel has consistently insisted that William comply with strict terms of the contract, but he has not been co-operative. Some of Emanuel's actions in connection with the loans after he came in possession of them requires a distinction between his legal rights and his equitable duty to act in fairness and in good faith toward William.

After November, 1930, Emanuel and William carried on correspondence by mail in which Emanuel made charges that William was not complying with the provisions of the contract relative to protecting him against losses on his mortgages; and he also, demanded an accounting of the rents collected by William from the Coon and the Yager buildings. William made charges that Emanuel, with the evil design of injuring him, was interfering with the servicing of the second mortgages which had been selected by him and was blocking the renting of the buildings. Charges and counter charges concerning Emanuel's liability under his guaranty with the Chicago Title and Trust Company and the management of the Variety Stores, Inc., were made in letters passing between the brothers.

On June 30, 1931, Emanuel sent a letter to William complaining that he was not paying the taxes on the real estate securing mortgages which Emanuel had purchased before the dissolution of the partnership and other mortgages which Emanuel had selected in part payment of his interest in the partnership. On April 9, 1932, Emanuel sent a letter to William requesting an accounting of rents collected and disbursements on the Coon and the Yager buildings; and also stated that mortgages which were owned by Emanuel and under the terms of the contract protecting him against one-third of the losses thereon, were in default and requested William to comply with this provision of the contract.

7.

It is not feasible to give a resume of the many letters appearing in the record. The quotations stated below illustrate the contention of the brothers relative to the mortgages which Emanuel had selected under the dissolution contract. This contention has never abated and it is the foundation of William's claim in this case that Emanuel does not come into equity with clean hands upon his claim against William for one-third of Emanuel's losses on the mortgages in question.

The interest on the notes securing the mortgages became due semi-annually and there were defaults of payments of interest on the notes in 1929, 1930 and 1931.

On January 13, 1932, William wrote to Emanuel:--

"I have written you a number of times notifying you that it was possible and I had arranged to procure deeds for you on properties where you were interested in the second mortgages, this being true of the McKerlie, Emanuelson and other properties. These were available at a cost of \$100.00 or less, which would have given you the properties at a figure much below their actual value, and therefore would have eliminated any possible chance of loss. In each case you disregarded my letter.

"As a result, in the case of McKerlie, for example, he has died since that time and it is now a question of waiting for his estate to be settled and the possibility of the terms for a deed may never again be available. Under the circumstances, you have deliberately invited possible loss where none was necessary, and I notify you that I will assume no responsibility for cases of this kind, as your action has invalidated any claim you might have had under the partial guaranty on these loans, as provided by my contract of February 1st, 1929, with you."

8.

On June 27, 1932, William wrote to Emanuel:--

"Last week I sent Miss Ross into your office with instructions to find out if certain loans were renewed directly by you and if certain interest items were paid, these loans having been ones in which I had an interest by reason of my contract guarantee. You refused to give her the information and told her that "I could find out for myself."

If this is the extent to which you wish to co-operate with me in endeavoring to keep these loans in good condition, it is satisfactory to me, being understood, however, that your failure to co-operate makes it impossible for me to do so and consequently relieves me of all responsibility in connection with these loans."

On July 20, 1932, William wrote to Emanuel:--

In sending out our August notices, we note that the following loans were due in February, 1932:

"Fulkerson E-93 due February 20th.

Free McKittrick due February 12th.

Emil Wolden (Shore Line E. Est.) E-22 due February 5th.

"Under the circumstances, it is necessary that we know whether the interest was paid, and whether the loans were renewed by you, otherwise we are not in position to know whether we are supposed to service these loans or not. This also applies to a number of loans which became due the early part of this year and last part of 1931, as covered by our other letters to you.

"We have not had a reply to these other letters and unless we receive such reply, we do not know whether to service them or not. We shall, therefore, consider ourselves relieved of such responsibility as we might have in connection with these loans."

On August 8, 1932, Emanuel wrote to William:--

"Upon my return to the office today, I read your letter of July 20, regarding the Fulkerson, McKitrick and Wolden loans, all of which are matured and in default.

"I do not know what you mean by "servicing" these loans. If "servicing," according to your meaning, is performing your obligations in connection therewith, in accordance with the terms of your contract, then needless to say, you have not done so, and had you done so, it would not be necessary for you to inquire as to the status of these loans.

"The false impression, which you aim to create with this letter is obvious. You have your obligations in connection with these loans, and your periodical letters denying responsibility to me, will not relieve you of this responsibility."

On May 15, 1934, attorneys for Emanuel sent a letter to William notifying him that three mortgages, definitely described in the letter, which Emanuel had purchased from the partnership before its dissolution and on which William had agreed in the dissolution contract to protect Emanuel against one-third losses, were in default. The letter also listed a large number of second mortgages which Emanuel had selected as part payment of his interest in the partnership and stated that they were in default. Relative to the second mortgages the letter stated:-- "In practically all of the loans mentioned, you have foreclosed, or caused to be foreclosed, prior mortgages. In addition you have for some time past failed to carry out your agreement to provide for the payment of such taxes as may be in default in connection with the property securing the payment of said loans." The letter made demand on William to purchase the loans, without loss to Emanuel, or reimburse him in accordance with the terms of the dissolution contract.

There is also made in this suit the claim by Emanuel that William is liable to the amount of \$9,000.00, plus \$2,500.00 court costs, which Emanuel expended in defending and compromising a suit by the Chicago Title and Trust Company against Emanuel on his guaranty of the Rosenblum loan. The guaranty of the Rosenblum note was signed by Emanuel individually on September 7, 1928, during the existence of the partnership, as a condition of the purchase of the note for \$27,000.00 by the Chicago Title and Trust Company. Emanuel bases his claim for such reimbursement from William on the provision of the dissolution contract providing that William assumes all liabilities of the partnership at the time of its dissolution.

On June 9, 1934, Emanuel filed his complaint against William in the circuit court of Lake County. The complaint sets forth the substance of the dissolution contract which is made an exhibit to the complaint.

The complaint alleges that William is in default under his written agreement to protect Emanuel against losses on certain loans purchased by him from the partnership before its dissolution and other certain loans which were selected by Emanuel as part of the consideration for his interest in the partnership. The mortgages are listed in the complaint giving the number of each loan, name of the borrower, maturity date and the last payment of interest on the loans.

The complaint also makes the following allegation concerning an alleged oral agreement between the brothers. "After the dissolution of the partnership the defendant William Schwartz assumed to act for the plaintiff in the handling of his funds and had access to his bank account for the purpose of making investments for the plaintiff under an agreement that if he used any of the funds of the plaintiff to purchase mortgages negotiated by William Schwartz, he, the said defendant William Schwartz,

would repurchase any such mortgages in the event of any default therein. Each and every one the following mortgages were sold by the defendant William Schwartz to the plaintiff upon express condition that he would repurchase said mortgages upon demand in the event of any default in the payment thereof. Said mortgages and amounts due on each of them are as follows:" Here the mortgages referred to are listed in the complaint. This paragraph of the complaint further alleges that the mortgages listed are in default and that the plaintiff had requested the defendant to perform his agreement to repurchase said mortgages, and to reimburse the plaintiff for the principal and interest remaining unpaid thereon, but that the defendant has failed to do so.

The complaint also alleges that William has failed to properly account for rents collected from the Coon and the Yager Buildings, and that he has not properly managed said buildings.

The complaint alleges:-- "That during the existence of said partnership said firm negotiated a loan from one M. H. Rosenblum from the Chicago Title and Trust Company, as Trustee. Said Chicago Title and Trust Company, after maturity of said loan, instituted proceedings against the plaintiff to enforce an alleged guaranty of said loan, claimed to have been made by the plaintiff in behalf of the partnership. Notwithstanding the fact that the defendant was notified by the plaintiff of the claim of the said Chicago Title and Trust Company and to defend the said proceedings, defendant wholly failed, neglected and refused to do so, as a consequence of which a verdict was entered against this plaintiff in the sum of \$31,800.00, which was thereafter compromised and adjusted by the plaintiff's agreement to pay the sum of Nine Thousand Dollars, and accrued expenses of over Two Thousand Five Hundred Dollars in addition to attorneys' fees, costs and other expenses. Said liability

was one of the liabilities assumed, and agreed to be undertaken and paid by the defendant as part of the consideration for said dissolution agreement. Although often requested thereto, the said defendant has wholly failed, neglected and refused to pay the said sum or to hold harmless the plaintiff from liability thereon."

The complaint further alleges:-- "Said defendant William Schwartz was the owner of sixty-six shares of the National Variety Stores, Inc., a corporation, and said plaintiff was the owner of one hundred and thirty-four shares of capital stock of said corporation. Said corporation was engaged in the operation of a general store in the storeroom of the Coon Building until approximately April 19, 1930, when it ceased the operation of said store. At the time said store ceased operations, there were funds in the Waukegan National Bank aggregating Eight Thousand Dollars belonging to said corporation, and said corporation was indebted upon leases to said plaintiff, said defendant William Schwartz and Jacob Schwartz, a brother of said defendant, William Schwartz and plaintiff, all of whom were the owners of said Coon Building. Said corporation was also indebted to plaintiff in various sums of money, which sums have never been paid, or accounted for to him. As a result of the acts of said William Schwartz improperly causing judgments to be entered against said National Variety Stores, Inc., upon said leases and upon a note in the amount of Five Thousand Dollars executed by said National Stores, Inc., and claimed by him to be due to him from said corporation, and in notifying said Waukegan National Bank not to pay out any of the funds of said corporation on deposit in said bank without the consent of said William Schwartz and in failing to account for sums due to said corporation received and retained by him, and as a result of other improper and unlawful acts of said William Schwartz in causing the property, assets and effects of said National Variety Stores, Inc.,

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to be dissipated and lost, the plaintiff has been subjected to losses to an extent of upwards of Ten Thousand Dollars, and said William Schwartz should be compelled to account and to pay to said plaintiff said losses sustained by him, due to the improper and unlawful acts of said defendant, William Schwartz."

Generally stated, the complaint prays that William be compelled to account for all money received on loans taken by Emanuel in part payment of his interest in the partnership; that William be required to pay Emanuel all sums found due him on an accounting of rents collected from the Coon and Yager building, and on account of the acts and conduct of William in connection with the Variety Stores, Inc., with a general prayer that William be required to account for all his acts and conduct in connections with all the matters and things set forth in the complaint, and to pay Emanuel all sums found due him on an accounting.

William, in his answer, denies the allegations of the complaint that he was in default and avers that Emanuel, by his inequitable conduct, prevented him from servicing the loans covered by the dissolution contract; that whatever losses Emanuel suffered on said losses are due to his wrongful interference, and not to the default of William; denies the alleged oral agreement alleged in the complaint to repurchase loans sold to Emanuel after the dissolution of the partnership. William filed a counterclaim as part of his answer seeking to recover losses of rents from jointly owned buildings and other losses caused by Emanuel.

The answer alleges also as follows: "Defendant denies any alleged guaranty of the M. H. Rosenblum loan was made by the plaintiff in behalf of partnership to this defendant, or that it was made with the consent or authority of this defendant, or that this defendant is indebted or obligated in any manner whatever under said alleged guaranty. Denies

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that the alleged liability under said alleged guaranty was the liability of said firm and was one of the liabilities assumed and agreed to be undertaken and paid by this defendant as part of the consideration for said dissolution agreement. Denies that he has in other respects failed, neglected and refused to perform any of the covenants and agreements contained in said contract by him to be kept and performed. Denies that he was under duty or obligation to defend the suit brought by the Chicago Title and Trust Company, and denies that he was in any manner whatever responsible or liable for any and all of the proceedings had in said lawsuit or relative to the same. On the contrary this defendant alleges that the alleged guaranty of said Rosenblum loan, the suit brought thereupon and all the acts and doings relative to the subject-matter thereof, were matters which the plaintiff alone was under duty or obligation to defend in his individual capacity, and for which plaintiff alone was responsible, and that this defendant was under no duty or obligation of any kind whatever in the premises. Denies that the verdict therein described was entered against this defendant, but on the contrary states that said verdict was entered against the plaintiff and that said action was prosecuted against the plaintiff alone, all of which will more fully appear from the files and records of the proceedings in said cause, reference thereto being had.

"And as a further defense to the matters and things set forth in paragraph 8 of the amended complaint, this defendant alleges that on and before July 31, 1930, said National Variety Stores, Inc., was indebted to this defendant upon a certain promissory note in the principal sum of \$5,000.00, executed by said corporation; that said corporation was well able to pay and should have paid the same, but that the plaintiff

arbitrarily and wrongfully refused to permit the said corporation to pay the said note, and persisted in such refusal that the wrongful conduct of the plaintiff in that regard was in pursuance of the evil plot and design of the plaintiff to ruin this defendant financially by depriving him of moneys to which he was lawfully entitled, all of which is more fully set forth in the counterclaim of this defendant hereto filed in the above entitled cause, as well as in the amended affidavits of this defendant filed in support of the defendant's motion to open the judgments by confession entered in this Court * * * * That as a result of said contumacious, malicious and unlawful conduct of the plaintiff, this defendant was compelled to and did bring action against the said corporation upon said note on to-wit: July 31, 1930, in the circuit court of Lake County, and as a result thereof a final judgment was entered in favor of this defendant and against the said corporation * * upon said note, together with accrued interest and attorney's fees as therein provided, for the sum of \$5,594.17, plus court costs; all of which will more fully appear from the records of this Honorable Court; that said judgment was a good, valid and final judgment and was not at any time in any way vacated, annulled, set aside, amended or reversed.

"And as a further defense to the matters and things set forth in paragraph 8 of the second amended complaint, this defendant alleges that on and before July 21, 1930, said National Variety Stores, Inc., as lessee, was indebted to the owners of the Coon Building, namely, the plaintiff, this defendant and Jacob Schwartz, as lessors, for the rental under its written lease, and that said indebtedness amount to the sum of to-wit: \$12,500.00; that the said corporation was then well able to pay and should have paid the said rent, but that the plaintiff, being the

major stockholder, of said corporation, arbitrarily refused to permit said corporation to pay said rent, and persisted in such refusal; that the wrongful conduct of the plaintiff in that regard was likewise in pursuance of the evil plot and design of the plaintiff to injure this defendant financially by depriving him of moneys to which he was lawfully entitled, as hereinbefore set forth, as well as in pursuance of the plan of the plaintiff to avoid arbitrarily, without justification, the payment of the said obligation; that as a result thereof it was necessary in order to obtain the collection of the said delinquent rental to bring suit in the Circuit Court of Lake County, Illinois, against said corporation, which was accordingly done; that in said suit the plaintiff, this defendant, said Jacob Schwartz and said National Variety Store, Inc., were parties; that such proceedings were had therein that judgment was rendered against the said corporation on to-wit July 21, 1930, in said court for said rental, (with costs and attorney's fees) of \$12,525.00; that in the said proceedings said Emanuel Schwartz sought to have the said judgment vacated and set aside, and for that purpose caused to be filed his motion and affidavit in support thereof, which motion was denied by the order of this court, and the said judgment became and is a final judgment; all of which will more appear," etc. "that it was necessary to institute garnishment proceedings in this Honorable Court upon said judgment for the purpose of obtaining collection thereof, and the same was accordingly collected all of which by the records of this court will more fully appear."

The six judgment notes which William executed in favor of Emanuel in part payment of his interest in the partnership are not involved on the merits of this suit. However, it is necessary to state certain facts concerning the notes. The two notes of last maturity

were not paid by William when they became due on March 1, 1933, and on March 1, 1934. On April 30, 1934, Emanuel took judgment on the notes. Upon motion of William the judgments were opened and he was given leave to plead, which he did. The defenses which William made to the judgments were substantially the same as the defenses set upon in his answer in this suit in equity. The proceedings at law concerning the judgments were by the stipulation of the parties consolidated with the present suit. During the hearing of this suit William paid the judgments with costs. The judgments were entered in cases No. 33386 and No. 33387, and this consolidated case is No. 33536.

The parties waived a trial by jury and stipulated for a hearing before a special master in chancery.

By stipulation of the parties it was agreed, with respect to any costs incurred in connection with the hearings before the master in causes Nos. 33386 and 33387, that such costs should be assessed by the court as costs in cause No. 33536 against the party found to be liable therefor by the court as though said judgment as to costs in said causes Nos. 33386 and 33387 had not been satisfied.

The master made his report and findings to which the parties filed objections and exceptions.

In this appeal, prosecuted by Emanuel Schwartz, three of the mortgages which Emanuel purchased from the partnership before its dissolution are involved. They are covered by William's covenant in the dissolution contract to protect Emanuel against one-third of his losses on the mortgages. There is no provision in the contract that William was to service these loans. The three loans are: Larsen Loan #170, Vipond Loan #175 and Seigall Loan #174.

The master and the chancellor found that there was no inequitable conduct by Emanuel which barred his recovery of one-third

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of his losses on the Larsen and Vipond loans.

Regarding the Seigall loan the master found as follows:

"Principal \$6,000.00 a first mortgage. Plaintiff made a second mortgage of \$200.00 on this property. He has been managing and controlling the property and collecting the rents therefrom, which he has applied in payment of his second mortgage and has permitted the first mortgage and the taxes to become delinquent. This not equitable. The income from the property must be applied in the proper order, first to the payment of taxes and second to the payment of the first mortgage, principal and interest. I recommend that there be no liability against the defendant in connection with this loan."

The chancellor did not follow the recommendation of the master regarding the Seigall loan and held William liable for one-third of Emanuel's loss on the loan. William has assigned cross-errors on the provision of the decree holding him liable on these three mortgages.

In this appeal there are involved forty-seven loans which Emanuel selected in part payment of this interest in the partnership and which William agreed to service and to protect Emanuel against one-third of his losses on the loans. The master held William liable for one-third of the losses of Emanuel upon thirty-six of the loans and not liable on eleven. The chancellor held that Emanuel was barred from recovering upon any of the loans because of his inequitable conduct and wrongful interference in their management. Emanuel appeals from the decree denying him recovery on one-third of his losses on the forty-seven loans. There is no contention that William should be held liable on the loans to the full extent of Emanuel's losses thereon.

The master and the chancellor applied the maxim "That he who comes into a court of equity must come with clean hands" against Emanuel on his demands that William should pay for losses sustained by Emanuel on the loans which he selected as part payment of his interest in the partnership, under different concepts of the application of the maxim, as will hereafter appear. It is contended by William that the maxim should be applied on his cross-appeal, to Emanuel's claim of losses on the three loans which Emanuel purchased from the partnership before its dissolution.

It is contended by counsel for Emanuel that the complaint joins legal and equitable causes of action and that the allegations of the complaint alleging losses to Emanuel because of default of the loans, is a legal demand for damages based on the contract of dissolution, and therefore, not subject to the maxim.

It does not appear from an examination of the objections and exceptions taken to the master's report and finding that this contention of Emanuel was made before the master, or the chancellor. The complaint alleges that William received rents from property encumbered by the mortgages which Emanuel had selected and purchased under the terms of the contract; that an accounting should be had to determine the amounts of rents so collected, and they should be applied in reduction or payment of loans so obtained by Emanuel. A large number of Emanuel's objections to the master's report are based on his contention that the findings on the alleged losses sustained by him on the loans are the result of erroneous accounting by the master.

The cause was tried by both parties, relative to their respective claims, as a chancery suit of accounting, and it will be so treated

on this appeal, as it has all the characteristics of a chancery suit. (Mortimer v. Potter, 213 Ill. 178; Reed v. Engel, 142 Ill. App. 413; City of Chicago v. Chicago Terminal Transfer R. Co., 121 Ill. App. 197; Chrystal v. Gerlach, 25 S. D. 128, 125 N. W. 633; 4 C. J., p. 714; 3 C. J., p. 724.)

As before stated after the dissolution of the partnership, Emanuel with the consent of William, had office space in the office of Schwartz & Company in the Coon Building. In July, 1950, the brothers had a violent quarrel the cause of which cannot be determined from the conflicting evidence. Emanuel left the old office where he had been with William.

William carried on his business under the name of Schwartz & Company with his brother Harry, as an associate. Emanuel opened an office in the Coon Building next door to the office of Schwartz & Company and put E. Schwartz on the door of his office. Emanuel had stationery printed using the same office address as that of Schwartz & Company; the business "Real Estate Mortgages loans" appeared on William's letterheads and "Real Estate Mortgage Loans," on Emanuel's letterheads.

Most of the mortgages which Emanuel had selected as part of his payment for his interest in the partnership were subordinate to first mortgages held by the Metropolitan Life Insurance Company which were guaranteed by William. William was servicing the first mortgages and he had instruction from the insurance Company to foreclose any first mortgage which was delinquent if a payment was made on any junior mortgage thereto. William sent notice to the persons liable on the second mortgages when the interest or principal became due thereon. Some of these people went to Emanuel's office to pay interest on their notes. Others asked Emanuel for an extension of their notes and he,

in several cases, granted the extension for a commission. Emanuel did not credit the amount of his commission on the unpaid part of the notes, nor the interest due thereon.

William had a register of the loans selected by Emanuel under the dissolution contract. When his interest book showed that the interest was due on any of the loans, William would communicate with the debtors and if they had paid Emanuel the interest due he would give the debtor credit in his interest book. When the debtors told William that Emanuel had told them not to deal with William concerning the loans, William did not thereafter send notices to such debtors. William informed Emanuel that he would not be liable under the terms of the dissolution contract for losses on loans which Emanuel had, or would extend the time of payment thereon. William extended some of the mortgages for commissions which he divided with Emanuel. After 1932, William did not service the loans.

It appears from the evidence that Emanuel said he would "break" William; that he said that he would not permit the renting of the Coon and Yager Buildings because he wanted to "break" William; that he could stand it, but that William could not. That Emanuel told some of the mortgagees of the loans in question, after extending their loans, not to deal with William, relative to the loans. That William, from time to time, furnished Emanuel with written statements concerning collections and expenditures made in connection with the Coon and the Yager Buildings. All the above appears from the evidence, although denied by Emanuel.

In his findings the master stated that neither of the parties should receive any benefit from commissions received for the extensions of loans. He was of the opinion that the proof of general inequitable

conduct by Emanuel did not go to the substance of his right for an accounting on the loans; that if there was inequitable conduct by Emanuel, it should be confined to each particular loan.

The chancellor's view of Emanuel's conduct is stated in the record. He was of the opinion that Emanuel was guilty of such inequitable conduct and wrongful interference of the servicing of the loans by William as to bar him from an accounting on them.

It will be observed that part of the consideration for the dissolution of the partnership was that William paid Emanuel the sum of \$55,254.08 for his interest in, and the goodwill of the said firm's business. The chancellor, in discussing this contract, uses this language: "I further find in this connection that in a situation calling for the utmost goodwill and co-operation, the defendant made reasonable attempts to co-operate, but the plaintiff not only failed to co-operate with the defendant, but actively interfered with the defendant in handling the properties in which the plaintiff and defendant were each interested, and actively interfered in the defendant's conduct of the business purchased from plaintiff and in the defendant's carrying out the terms of the sale agreement entered into by the parties." The record shows, as before stated, the defendant purchased from the plaintiff his entire interest in the business including the goodwill thereof, also by the terms of the contract, William was to have the right to service all of these loans, which was a very valuable one for William.

The contract also provided that Emanuel would not go into the loan business in the City of Waukegan for a term of ten years, but after the quarrel and Emanuel had left the old office, he established an office adjoining that of William, under nearly the same name as the old firm,

and used identical letterheads in advertising his business. He took from William his right to service the loans, renewed some of them, and accepted commissions for doing so. Eight witnesses testified that they had heard Emanuel openly state that "he was going to break William;" that he was financially able to stand the loss of the unrented buildings, but William was not, and that he intended to break William. The record shows that he said it in a boastful manner. The record is bare of any evidence of where Emanuel co-operated in any way with William in the management of the mortgages that were selected by him under the terms of the dissolution contract. On the contrary, it shows many instances where his attitude was antagonistic to William in the management, and collection of these various loans.

It is insisted by the appellant, that if it is conceded that the master was correct in finding that Emanuel, did not come into a Court of Equity with clean hands, relative to some of the loans, there is no evidence to show that Emanuel did anything inequitable as to the balance of the loans, and therefore the maxim should not apply to the latter loans. The trial court held that there was one contract and these loans were taken as part of the consideration for the dissolution of the business. The actions of Emanuel relative to the whole transaction were such that it affected all of the loans. In this holding the Court was correct for out of the mass of evidence in this case, (over 8000 pages, plus 500 exhibits,) it cannot be said that Emanuel co-operated with William in any manner in helping him service these loans. Emanuel knew that William, in order to pay the loss, if any, that Emanuel might sustain in these second mortgages, would have to make that out of his business, and he deliberately set out on a course of conduct in trying to destroy his brother, William, financially, and thus destroy the fund from which William would have to pay his one-third of the losses. There was a moral duty if not a legal duty, to assist William in the servicing

of these loans, and also to refrain from doing anything that might interfere with the legitimate business of William. As to all of these mortgages it is our conclusion that the chancellor properly found that Emanuel did not come into a court of equity with clean hands, and he is not entitled to relief in a Court of Equity.

Attention is directed to the allegation of the complaint which charges that William orally agreed with Emanuel to protect him against losses on loans which Emanuel purchased from William after the dissolution of the partnership. These loans were second mortgages which Emanuel purchased from William for investment. The testimony of Emanuel that William entered into the alleged oral contract is contradicted by William and Harry Schwartz. The master and the chancellor found that Emanuel failed to prove this allegation of the complaint. The evidence on this matter, as above indicated, is very conflicting and of such a character that makes it impossible to determine the exact truth of the controversy. That part of the decree finding that Emanuel failed to establish this allegation of the complaint should be affirmed.

On September 8, 1928, the firm of E. Schwartz & Company negotiated a loan for Moses and Rose Rosenblum for \$30,000.00 secured by a first trust deed on real estate owned by the Rosenblums. In connection with this loan the Rosenblums executed one note for \$27,000.00 and three notes for \$1,000.00 each, all payable to E. Schwartz & Company. Emanuel guaranteed the note for \$27,000.00 and subordinated the three notes as required by the Chicago Title and Trust Company to whom an application for the loan had been made by E. Schwartz & Company on behalf of the Rosenblums. Upon the approval of the application for the loan, the note for \$27,000.00 was transferred to the Chicago Title and Trust Company,

as trustee, and \$27,000.00 was paid to E. Schwartz & Company by the trustee. The three notes were retained by the partnership and they were subsequently selected by Emanuel, as part payment of his interest in the partnership under the dissolution agreement. The three notes are not involved in the present suit. The firm of E. Schwartz & Company received a commission of \$1,500.00 for securing the loan for the Rosenblums. After deducting the commission and expenses in connection with making the loan, the balance of the \$30,000.00 was paid to the Rosenblums, by E. Schwartz & Company.

The note for \$27,000.00 became delinquent, and on July 11, 1932, the trustee filed its complaint to foreclose the trust deed.

On April 14, 1933, Emanuel notified William by letter that the Rosenblum property securing the trust deed was to be sold at master's sale on April 17, 1933, and that it was the plan of the Chicago Title and Trust Company to secure a deficiency judgment in the event the sale of the property was less than the amount due on the note of \$27,000.00. The letter stated, "We expect you to save me harmless, in connection with the above, and I am therefore notifying you regarding the situation, for such action as you wish to take in this matter at this time."

On September 12, 1933, the Chicago Title and Trust Company, as trustee, brought suit against Emanuel in the circuit court of Lake county on his guaranty of the note for \$27,000.00. On October 31, 1933, the attorney for Emanuel notified the attorney for William that the suit had been brought against Emanuel, and stated, "We shall expect William Schwartz to indemnify and hold E. Schwartz harmless as stated in the letter of E. Schwartz to William Schwartz, above referred to, and if you wish to join with us in this proceeding, at his expense, we will welcome your participation." William took no part or action

in the suit.

Emanuel defended the suit on the ground that he signed the guaranty appearing on the back of the note for \$27,000.00 with the understanding that he was thereby subordinating the three notes which were also secured by the trust deed executed by the Rosenblums. That the guaranty was stamped on the note without his knowledge instead of an agreement subrogating the three notes. In the suit there was a verdict against Emanuel for \$31,900.25 on his guaranty of the note for \$27,000.00. On January 16, 1934, the attorney for Emanuel notified William that the verdict had been returned against Emanuel. The letter further stated: "That as the surviving member of the firm of E. Schwartz & Company, you were obligated under the terms of the partnership dissolution agreement to pay all of the liabilities of every name and nature of the firm, and to undertake the defense of the proceeding. We were advised by your counsel that you were satisfied to have us proceed with the defense, which were are doing." "In behalf of our client, Mr. Emanuel Schwartz, we advise you that we shall expect you to carry out your promise to pay the liability in question, if a judgment is entered upon the verdict, and to indemnify and hold our client harmless of all loss, cost and expense which he has been put to in that connection."

As before stated, the dissolution agreement provided that the assets of the partnership when purchased by William should be based on the total assets of the firm, as of February 1, 1929, less the liabilities of the firm of every nature and kind, which liabilities William assumed and agreed to pay as part of the consideration of the agreement.

The agreement also provided as follows:-- "It is understood and agreed that in the settlement pertaining to the selling and purchasing of the assets and the assumption of the liabilities hereunder between the parties hereto, is based upon a statement of said assets and liabilities attached hereto, and made a part hereof, dated February 1, 1929; and it is understood and agreed that at any time prior to the expiration of two years from the date hereof, if any of the items included in said statement of assets and liabilities are found to be incorrect, either of the parties hereto may notify the other party of such error, and an adjustment of said error shall be made between the parties hereto in the same proportion as the interest of said parties were at the time of the signing hereof, in the said assets and liabilities."

Emanuel's liability on his guaranty of the Rosenblum note was not listed in the statement of assets and liabilities of the partnership attached to the dissolution agreement.

Emanuel obtained a release of his guaranty of the Rosenblum loan by paying \$9,000.00, and the verdict against him on his guaranty was set aside and the suit of the trustee dismissed before the master made his report in the present suit of accounting.

The master found that the guaranty of the note for \$27,000.00 was signed by Emanuel individually, but that it was a liability incurred on behalf of the firm of B. Schwartz & Company. He recommended that William be required to pay Emanuel one-third of his expenses to the amount of \$1,075.00 in defending the suit of the trustee against Emanuel and one-third of the \$9,000.00, with legal interest.

After the master made his report, Emanuel received a note for \$80,000.00 from the Rosenblums in settlement of litigation between Emanuel and the Rosenblums involving title to real estate and several

notes of the Rosenblums which were owned by Emanuel. The note for \$80,000.00 is secured by a mortgage on real estate of the Rosenblums of sufficient value, (it is admitted by Emanuel,) to amply secure the note.

After the filing of the master's report herein, William filed a supplementary answer to the complaint in which he alleged, in substance, that the payment of the \$9,000.00 to the Chicago Title and Trust Company by Emanuel was one of the items making up the amount of the note for \$80,000.00 which Emanuel received in settlement of his litigation with the Rosenblums. Emanuel filed a reply to the supplementary answer denying the allegation of the answer. By stipulation of the parties there was a hearing before the chancellor on the question of fact submitted by the supplementary answer and the reply thereto.

The chancellor found that the \$9,000.00 was not included in the settlement which Emanuel made with the Rosenblums. The chancellor, in the decree, requires that William pay Emanuel one-third of the \$9,000.00 paid by Emanuel in settlement of his liability on the guaranty of the Rosenblum loan, and, also, pay Emanuel one-third of the expenses of \$2,256.50 paid by Emanuel defending the suit on the guaranty, with interest on said sums at five per cent from April 10, 1934, to the date of the decree.

The testimony before the chancellor on the question of fact whether the \$9,000.00 was one of the items making up the amount of the Rosenblum note for \$80,000.00 is in conflict, and we cannot say that the finding of the chancellor on this point is clearly and palpably erroneous. In *Van Der AA v. VanDrusen*, 208 Ill. 108, it is stated:

"This case was tried before the chancellor, and we have often said and as is patent to everyone, the trial judge, in cases of this kind, has opportunities for correctly weighing the evidence and arriving at the truth far superior to our own, which fact this court is bound to take into consideration and give due weight thereto when called upon to review a decree."

The partnership of E. Schwartz & Company received a commission for making the Rosenblum loan; the three notes for \$1,000.00 each became partnership assets and they were selected by Emanuel in part payment of his two-thirds interest in the partnership under the dissolution agreement. The loan was made as partnership business and the partnership received the profits and benefits of the loan. It is clear from the record that the partners by common mistake failed to take into account the outstanding liability of the partnership on the Rosenblum loan when they prepared and executed the partnership dissolution agreement.

Emanuel owned two-thirds of the assets, or capital, of the partnership, and William one-third. The loss of \$9,000.00 to the assets of the partnership should be borne proportionately by Emanuel and William according to their former respective interest in the partnership assets. It is fair and just that the statement of account contained in the dissolution agreement should be surcharged to the credit of Emanuel to the amount of \$3,000.00 and that William be held liable to Emanuel for that amount. (See, *Stage vs. Gorich*, 107 Ill. 361; *Ehrmann v. Stitzel*, 121 Ky. 751, 90 S. W. 275; *Johnson vs. Ballard*, 85 Tex. 486, 181 S. W. 686.)

William has assigned cross-erros, that he is entitled to an accounting from Emanuel for loss of income from the Coon and Yager buildings caused by the unconscionable conduct of Emanuel, as shown under the law and the evidence in the case.

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The chancellor overruled the exceptions to the Master's report and held that the defendant was not entitled to an accounting for the loss of rent on the Coon building.

It will be observed that as part of the dissolution contract William had the right to rent the Coon building. He made repeated attempts to rent the building, and was successful in obtaining tenants, but Emanuel refused to co-operate with him, and sign a lease for the same. The evidence shows that Jack Levine, a friend of both Emanuel and William, tried to get Emanuel to straighten out their business, and stop their quarrelling, and straighten up their affairs, that Emanuel replied, "No, I won't do it, I am going to break those fellows," to which Levine replied, "Look at the rents you are losing, and money, and look at the rents you are losing, money on the stores that are not rented. You have got to rent those stores now," to which Emanuel replied, "I won't rent those stores until I break them." We think the evidence fully sustained the master's finding that Emanuel was responsible for keeping the store in the Coon Building vacant, and that no blame could be attached to the defendant, William, for failing to keep this store building rented. Emanuel evoked the aid of a court of equity to have William account for the rents on this building. Courts will enforce the rule that, "He who seeks equity must do equity." Under the facts, as shown by the record in this case, William is entitled to have an accounting for the loss of rent of the Coon Building, caused by Emanuel.

There are other errors and cross-errors assigned, and we have examined each and all of them. With the exception of the finding of the chancellor in regard to the accounting for the loss of rent of the store in the Coon Building, we are satisfied the holding of the chancellor is correct.

31.

It is therefore ordered that that part of the decree in holding that William Schwartz is not entitled to an accounting for the loss of rent for the storeroom in the Coon building is hereby reversed. The decree in other respects is affirmed.

The costs should be assessed against the appellant.

Reversed in part, and affirmed in part, and the cause remanded.

Reversed in part, and affirmed in part, and the cause remanded.
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The Master in Chancery found that the plaintiff, Emanuel Schwartz, had unreasonably kept the storeroom in the Coon Building from being leased from Feb. 1, 1931, to Feb. 1, 1935, and that a fair and reasonable rent, after deducting for repairs and other necessary expense, would be \$600.00 per month, for a period of four years; that William owned a two-ninths interest in the building, and his share of the lost income for this period would be the sum of \$6400.00. It is our conclusion that the evidence sustains this finding of the Master.

The appellant, Emanuel Schwartz, in his petition for rehearing, states: "that if the Court adheres to its opinion with reference to the Coon Building, that this Court determine on the record, now before it the amount of damages to be assessed against the plaintiff on account of the nonrental of said building, during the periods in question, and that a judgment be entered by this Court in this cause shall be final and appealable."

William Schwartz has filed his consent in writing and requests this Court to enter judgment in his favor for \$6400.00 being his share of the loss of rent on the Coon Building, plus the sum of \$3,804.48 being the statutory interest on \$6400.00 to the date of the entry of this judgment.

It is therefore ordered that that part of the decree in holding that William Schwartz is not entitled to an accounting for the loss of rent for the storeroom in the Coon Building, is hereby reversed, and the decree is modified in accordance with the report of the Master in Chancery, by adding to the amount found due William Schwartz the sum of \$10,204.48, being \$6400.00 for William's share of loss of rent with statutory interest from the dates respectively that the rent was due to the date of the decree. The decree as modified, is affirmed.

Abstract

Gen. No. 10116,

Agenda No. 4.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.

OCTOBER TERM, A. D. 1946.

CATHERINE HARTONG,
Plaintiff-Appellee,

vs.

JOHN J. HARTONG,
Defendant-Appellant.

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) Appeal from
) Circuit Court,
) Will County.
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WOLFE,-- P. J.

On February 26, 1946, Catherine Hartong filed her suit for separate maintenance against her husband, John J. Hartong. She alleges that on January 27, 1946, the defendant deserted her without any cause on her part, and has persisted in said absence, and that the defendant had pursued a morose, hostile, quarrelsome and wrongful course of conduct towards the plaintiff; that he had become quarrelsome and abusive towards her, and used vile language towards her, so as to render her condition intolerable, her life unbearable and her health impaired; that on December 23, 1945, the defendant grabbed plaintiff by the wrist, twisted her arm, and scratched her, causing her wrist to become sore and discolored; that on the same evening defendant grabbed plaintiff by the shoulders and backed her up against the wall, thumping her backwards and forwards against

2.

the wall, causing her back to become sore, and causing her pain; that on many other and divers occasions, the defendant had abused, and otherwise mistreated her.

The parties have one child, John Hartong, Jr., then of the age of about four and one-half years. She asked the care and custody of this child, suitable money for her own and the child's support, suit money and for such other and further relief, as equity may require and the Court deems meet. The petition is verified.

The defendant filed an answer in which he admits the marriage, and the birth of the child, but denies that the plaintiff is a fit and proper person to have the care, custody and control of said child. He also denies that he deserted the plaintiff, or that he had mistreated her, as charged in the bill of complaint. The case was submitted to the Court without a jury, who found the issues in favor of the plaintiff, and entered a decree of separate maintenance granting the plaintiff the custody of the child, and allowing alimony in the sum of \$100.00 per month. From this decree, the defendant has perfected an appeal to this Court.

The appellant has assigned eleven errors relied upon for reversal. The first one is, that the Court was without jurisdiction to decree separate maintenance, or to give the custody of the child to the plaintiff. It is argued by the appellant that the Court did not have jurisdiction of the subject-matter of the suit, because Mrs. Hartong, in her testimony, stated that the reason she filed the suit was to get custody of the child. We find no merit in this contention, as the petition itself clearly states that she is asking for separate maintenance, also the custody of the child. The evidence clearly shows that the suit is one for separate maintenance.

3.

It is assigned as error that the amount of the alimony and suit money allowed by the trial court, in the decree for separate maintenance, is excessive. This point is not argued in the brief, so it is considered waived. The other assignments are all questions of fact, that the Court had to determine from the evidence in the case.

The appellant, in his reply brief, charges that the brief and argument filed on behalf of the appellee, is not based upon facts in the record, but "is builded upon misstatements of fact, upon deception in composition, and upon an attempt to create feigned issues." In support of this charge he says there is nothing in the record to support the fact, "plaintiff who is only seventeen years of age, married John Hartong." On Page 57 of the record, Mrs. Hartong testified that she met Mr. Hartong while she was in High School in 1938, and at that time she was fourteen years of age; that she was married to the defendant on Aug. 7, 1941. This clearly supports the statement of the appellee that she was seventeen years of age at the time of her marriage. He also claims that there is no evidence to support the statement that the defendant was of a quarrelsome disposition, etc., and quotes some of the evidence given by the defendant. He wholly ignores the evidence of the plaintiff. This case is like all other contested ones. The plaintiff produces evidence to support her contentions, and the defendant denies the wife's charges. The plaintiff testified positively, that, from the time that the defendant came home from the army, there was constant bickering and quarrelling and upon one occasion, he held her arms and twisted them, scratched her and bumped her head back and forth against the wall. She is corroborated

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in this by Mrs. Edith Downing at whose house Mrs. Hartong was staying the night that this occurred. Mrs. Downing testified that when the Hartongs came into the room where she was, Mrs. Hartong was crying; that she could see that her wrists were red and she noticed scratches; that Mrs. Hartong told her what caused the scratches and the red marks, and why she was crying. On cross-examination she said that Mrs. Hartong had told her that she did not want to live with her husband anymore, because he mistreated her. Mr. Hartong denied these acts of cruelty. From a reading of the record, we are satisfied that the evidence preponderated in favor of the plaintiff, and the Court properly found that this charge in the complaint for separate maintenance had been proven.

The evidence shows that the parties separated on Jan. 27, 1946, and have not lived together as husband and wife, since that time. Shortly after the separation, the defendant wrote a letter and sent it by registered mail to the plaintiff, in which he informed her that he had rented an apartment in Joliet, and would like for her and Jackie, the son, to come and live with him. He described the apartment as being a suitable place for them to live with him. It is contended by the appellant that this letter was written in good faith, and therefore the plaintiff failed to prove desertion, as charged in her complaint. Several letters written by the defendant to the plaintiff were introduced in evidence, in which the defendant tells of his love for his wife, but in practically every one he uses vile language towards her, and calls her dirty names. We do not have the letters of the wife to the husband, but in Exhibit No. 3A, we find the following:

"Well, after reading my letter, Catherine, if your mind isn't changed, why I wish you would file for a divorce at any cost, and I will pay accordingly." In several of his letters, while there is no direct charge of infidelity against the wife, it is clearly insinuated and he tells what he could do while he was in the army, and says for her not to quote the old saying to him: "What is good for the goose is good for the gander."

Soon after the appellant arrived home, and went to live with his wife and child in her parent's home, he had detectives shadow his wife, clearly with the intent of catching her in some adulterous action. The detectives testified and wholly failed to prove anything against the character of the appellee. The appellant took his wife to the Morrison Hotel in Chicago, and had detectives place a dictaphone in their room and had recordings made of what took place therein. The appellant destroyed these records, so it is presumed that the records did not disclose anything which would be beneficial to the defendant's case.

No doubt the trial court read all of these letters and considered the appellant's attitude towards the appellee, and came to the conclusion that the letter asking the appellee to come and bring her son to live with him, was not an offer in good faith on behalf of the appellant to make a home for his wife.

The trial court was in a much better position to judge the credibility of the witnesses in the case than a court of review. We would not be justified in reversing the case, unless his findings are against the manifest weight of the evidence. It is our conclusion that the evidence fairly sustains the Court's findings, and the decree for separate maintenance should be affirmed.

Decree affirmed.

FILED
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Abstract

Gen. No. 10,130.

Agenda No. 7.

IN THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT.
FEBRUARY TERM, A. D. 1947.

ELIZABETH STITZEL, Administrator
of the Estate of Clarence Stitzel,
Deceased,
Plaintiff-Appellee.
vs.
GLENN JOHNSON,
Defendant-Appellant.

Appeal from
Circuit Court of
Winnebago County.

WOLFE,-- P. J.

Elizabeth Stitzel, as Administratrix of the Estate of Clarence Stitzel, deceased, brought suit in the Circuit Court of Winnebago County, against Glenn Johnson for the death of plaintiff's intestate who died as a result of injury received while riding as a guest in a car driven by Frank Benedict. The Benedict car was struck by a car driven by the defendant, Glenn Johnson. Prior to the collision, the Benedict car was proceeding south on South Third Street, and had reached the intersection of said street and College Avenue. Glenn Johnson, in his automobile, was approaching the intersection from the west on College Avenue. The car in which the deceased was riding had nearly crossed the intersection when the Johnson car collided with it and Clarence Stitzel received injury from which he died.

1919

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

RESEARCH REPORT

ON THE CHEMISTRY OF THE

ALUMINUM

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It is claimed that the deceased, Clarence Stitzel, at the time of the injury, was in the exercise of due care and caution for his own safety, but because of the careless and negligent manner in which Glenn Johnson was driving his automobile, the plaintiff's intestate received the injuries from which he died. It is alleged in the complaint that the defendant on approaching the said intersection, committed one or more of the following acts or omissions. "A. Drove at an unreasonable and illegal rate of speed. B. Negligently drove said automobile at a dangerous rate of speed at said point. C. Negligently failed to sound a horn, or give other signal of its approach, and approached so rapidly that plaintiff's intestate was unaware of the approach of defendant's said automobile." It is also alleged that the car Frank Benedict was driving arrived at the intersection considerably before the car operated by the defendant; that the Benedict car entered the intersection at a lawful rate of speed when the car driven by the defendant was about 100 feet west of the intersection. The defendant denied all acts of negligence on his part, and denied plaintiff's intestate was in the exercise of due care for his own safety.

The case was submitted to a jury who found the issues for the plaintiff, and assessed the damages at \$8,000.00. The trial court overruled the motion for a new trial made by the defendant-appellant, also denied his motion for a judgment notwithstanding the verdict. Judgment was then entered in favor of the plaintiff and against the defendant for \$8,000.00. It is from this judgment that an appeal has been perfected to this Court.

3.

It is first insisted by the appellant that the Court erred in refusing to give instructions Nos. 7 and 8 tendered by the defendant. Instruction No. 7 was a statutory provision stating what rate of speed shall be deemed prima facie evidence that a person is operating a motor vehicle at a rate of speed greater than is reasonable and proper, with regard to the traffic and the use of the way, etc. In *Johnson vs. Pendergast*, 308 Ill., at page 255, the Supreme Court uses this language: "'It is doubtful whether the ordinary juror would understand the legal meaning of the term prima facie.'" While this instruction is in the language of Section 22 of the Motor Vehicle Act (Cahill's Ill. St., ch. 95a, p. 23), it is a matter of common knowledge that there is probably no law upon our statute book as to which there is such widespread popular misunderstanding and misconstruction of its terms. There is no speed limit in miles fixed by this section of the statute. This misconstruction is not confined to the ordinary citizen but is shared by many officials as well. It is a matter of common knowledge that upon the outskirts of many of the cities of the State are signs stating a speed limit in miles and that upon our new State highways are signs stating that the speed limit is thirty-five miles per hour. It does not follow that because a rate of speed in miles is stated in the statute to be prima facie unreasonable and dangerous, that such rate of speed is in fact unreasonable and dangerous in every case or that a lesser rate of speed in every given case is reasonable and not dangerous. A rate of speed of fifty to sixty miles an hour with a heavy, high-powered car, on a cement roadway, in the country where there are no side roads or farm crossings or farm buildings, with no traffic of any kind upon the highway, with a careful driver, might not be unreasonable or dangerous, while a

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rate of even three miles per hour, upon that same highway, in that same locality, while a flock of sheep or cattle were driven thereon might be unreasonable and dangerous rate of speed and therefore unlawful." The instruction as offered was not proper and the Court did not err in refusing to give it.

Instruction No. 3, was an attempt to state the law relative to the duty resting upon plaintiff's intestate to warn the driver of the car of approaching danger. In *Palmer vs. Miller*, 310 Ill. App., 582, a similar instruction was refused by the trial court. On page 595 we find the following: "Defendant's instructions which were predicated on the theory that there was a duty on part of the plaintiff, Mrs. Palmer, to warn the driver, were properly refused in view of the long line of cases in this State establishing that there is no such duty on part of a passenger, (*Smith vs. Carter*, 302 Ill. App., 235; *O'Neal vs. Caffarello*, 303 Ill. App. 574.)"

Under the evidence in this case, which is not disputed, the driver of the car saw appellant's car approach from the west, at a distance of 100 feet or more, as the Benedict car entered the intersection. It is stated in *Smith vs. Carter*, supra, "Plaintiff was a guest passenger and defendant argues that it was his duty to warn or caution the driver of his car against the danger of collision which must have been apparent to plaintiff. Due care may be shown by direct evidence or by facts and circumstances which lead to a reasonable inference of due care. A passenger in an auto need not warn the driver of the approach of other autos which the driver sees." To the same effect is *Schultz vs. Live Stock National Bank of Chicago*,

278 Ill. App. 623. In this case the Court cited and quoted from Hermann vs. Rhode Island Company 36 R. I. 447, which clearly states the law as recognized in this state. It was not error to refuse the 8th instruction.

Appellant also contends that the Court erred in giving appellee's instructions Nos. 13, 14 and 15; that instructions Nos. 13 and 14 are inconsistent. We have examined carefully these two instructions and we find no merit in plaintiff's contention. It is also contended that instruction 15 is repetitious and serves no purpose, but to push into prominence the question of right of way. Our Courts have often criticized the giving of too many instructions upon the same question, but we do not believe the Court had abused his discretion on giving three instructions in different language bearing upon the same subject. However, the appellant is in no position to raise this question, as we find his instructions Nos. 21, 26 and 27 were on the same subject.

In questioning the prospective jurors as to their competency to serve on the jury, the attorney for the plaintiff asked a prospective juror, Lobdell, what his business was. He said he was a real estate man. He was then asked if he also sold insurance, and he said, 'yes.' He was asked if it was his duty to investigate accidents. This question was objected to and sustained by the Court. He was then asked if he would be able to disregard any question of fact that he was in the insurance and real estate business. The Court also sustained the objection to this question. The defendant then made a motion to withdraw a juror. This motion was denied. No motion was made to discharge the panel. It is now

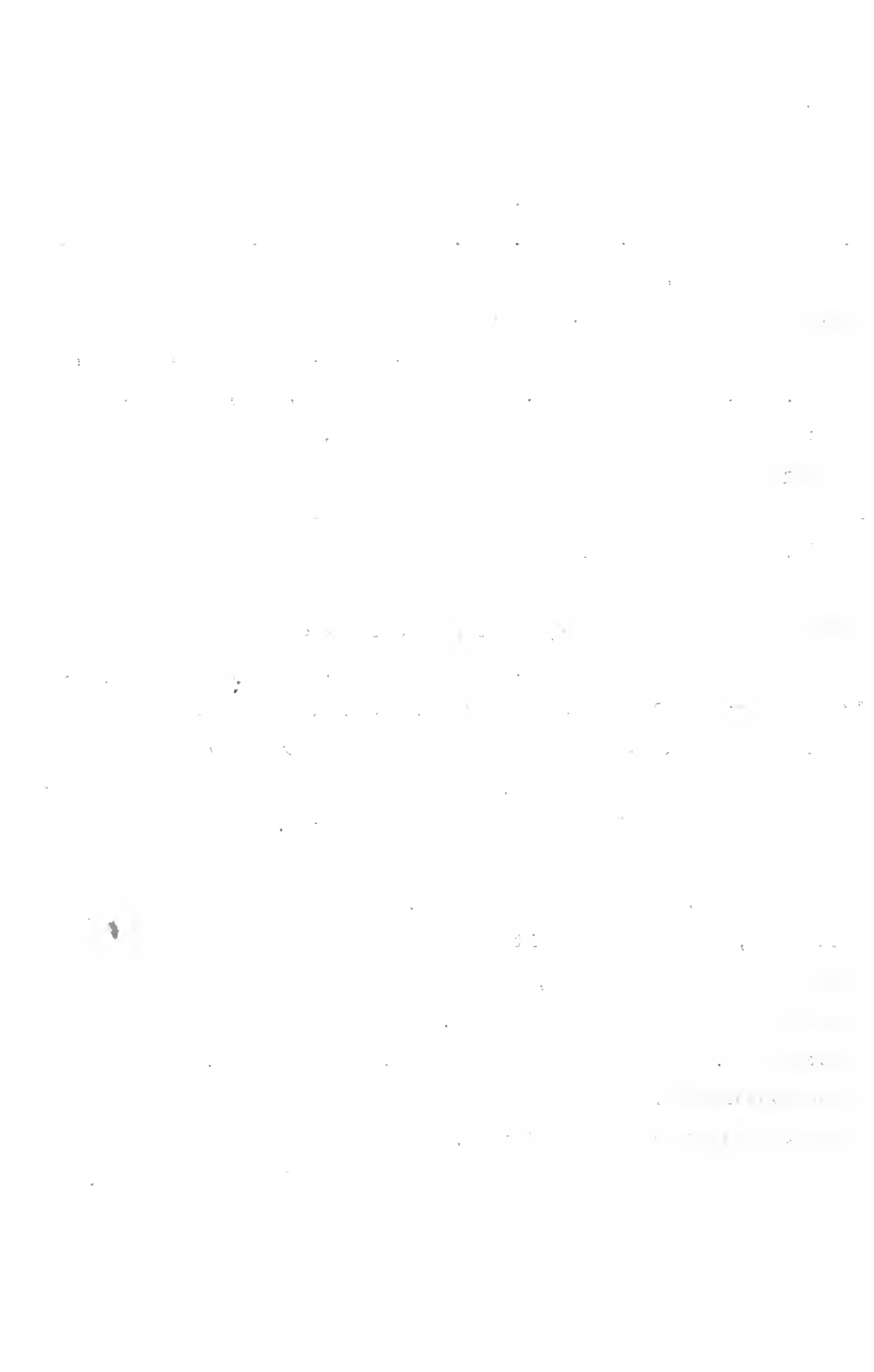
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assigned as error that the Court erred in not permitting the defendant to withdraw a juror. The question of insurance has frequently been before the Supreme and Appellate Courts. There is no hard and fast rule that can be laid down just how far an attorney can go on his examination of a prospective juror, but in the recent case of Moore vs. Edmonds, 384 Ill. 524, at page 541, the Supreme Court lays down a rule which should be followed, and it is stated in the following language: "The question with respect to when an inquiry as to jurors' interest in an insurance company is prejudicial to defendant has been the subject of frequent and extended consideration by this court and the courts of other jurisdictions. Judicial opinion almost universally recognizes the right of the plaintiff in good faith to interrogate the jurors on their voir dire examination as to their, or their relatives', possible connection with, or interest in, liability insurance companies, in order to determine the expediency of exercising his right to peremptory challenge to the end of obtaining a jury free from bias and prejudice, even though such inquiries may develop a suspicion in the minds of the jury that defendant is protected by insurance. (105 A. L. R. 1330; 95 A. L. R. 404; 74 A. L. R. 860; 76 A. L. R. 1454, and cases cited.) Ever present is the problem of balancing the opposing rights of the parties. First, each party enjoys the right to make inquiries of jurors in order to intelligently exercise his right of challenge. The opponent, at the same time, requires protection, even in the voir dire examination, from any irrelevant matter likely to be prejudicial. Questions may, of course, be asked for the purpose of exercising peremptory challenges, as well as challenges for cause. (O'Hare v. Chicago Madison and

Northern Railroad Co. 139 Ill. 151.) The purpose of the examination, it has been said, is to determine whether a juror "possesses the necessary qualifications, whether he has prejudged the case, whether his mind is free from prejudice or bias, * * *." (Lavin v. Poople, 69 Ill. 303.) In *Smithers v. Henriques*, 308 Ill. 586, we said: "Under his duty as a lawyer and to his client, plaintiff's counsel was required to exercise all lawful means known to him to see that no interested party sat as a juror in the case." As recently observed, "It is of course counsel's duty to protect his client against prejudice by the reasonable ascertainment of such information as would permit him to intelligently exercise his right of peremptory challenge, but the right goes no further." (*Kavanaugh v. Parrot*, 379 Ill. 275.) In the exercise of a sound judicial discretion, the trial judge may limit the examination for the reason that its scope necessarily varies with different fact situations." The trial court did not err in overruling the defendant's motion to withdraw a juror.

It is next insisted that the verdict of the jury was contrary to the manifest weight of the evidence. When the jury is properly instructed, and they reach its verdict it will not be lightly disturbed by a court of review, and unless we can say that it is against the manifest weight of the evidence, we would not be justified in reversing it. We have read the evidence, as abstracted, and we think it preponderates in favor of the plaintiff and that the judgment of the trial court should be affirmed.

Judgment affirmed.



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1947.

ALICE NELSON,
Plaintiff-Appellee,

vs.

R. D. NIHAN and C. E. MARTIN, co-
partners, doing business as NIHAN
& MARTIN,
Defendants-Appellants.

3321A 310
Appeal from the
Circuit Court of
Winnebago County.

WOLFE,-- P. J.

On the 31st day of May 1941, Alice Nelson and three companions were riding in the Nelson car in a westerly direction on Fourth Avenue in the City of Rockford, Illinois. At the same time Robert Cooling, an agent and servant of R. D. Nihan and C. E. Martin, copartners doing business as Nihan & Martin in the City of Rockford, was driving the Nihan and Martin car in a southerly direction on Seventh Street in said city. The Nelson car was being driven by Alice Nelson. As she approached the intersection of Seventh and Fourth Avenue, she stopped her car, then proceeded across the intersection, and while doing so, was struck by the Nihan car and her car was damaged, and she sustained personal injuries.

Alice Nelson started the suit in the Circuit Court of Winnebago County against Nihan and Martin to recover for the injuries she claimed



1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes the need for transparency and accountability in financial reporting.

2. The second part of the document outlines the various methods and techniques used to collect and analyze data. It includes a detailed description of the experimental procedures and the statistical analysis performed.

3. The third part of the document presents the results of the study, showing the trends and patterns observed in the data. It includes several tables and graphs to illustrate the findings.

4. The fourth part of the document discusses the implications of the results and the potential applications of the findings. It highlights the need for further research and the importance of continuous monitoring and evaluation.

5. The fifth part of the document provides a conclusion and a summary of the key points discussed throughout the document. It also includes a list of references and a bibliography.

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to have sustained because of the collision mentioned. In her complaint, she alleges that just prior to, and at the time of the collision, she was in the exercise of due care and caution for her own safety, and for the safety of her automobile; that the negligent, reckless and dangerous manner in which the defendants' car was being driven, was the proximate cause of her injuries.

She charged the defendants in the operation of said automobile by their servant, were guilty of some, or all of the following acts of negligence: "(a) That by their said servant they operated said automobile of the defendants at a high and dangerous rate of speed, in excess of twenty-five miles per hour, considering the traffic and use of the way; and that said Seventh Street over which said automobile was driven at and just prior to said accident was a closely built-up business district.

"(b) That by their said servant they operated said automobile of the defendants without maintaining a proper vigil and lookout for the safety of the plaintiff and of her automobile, or all other persons and other automobiles lawfully using and crossing Seventh Street at the time and place above mentioned.

"(c) That the defendants by their servant, after observing the automobile of the plaintiff upon said street in such a position that an accident was imminent if the defendants' car continued to be driven in the same course in which it was proceeding, failed to properly turn or swerve said automobile to avoid said accident.

"(d) That the defendants by their said servant failed to apply the brakes on their said automobile to avoid a collision, and failed to keep their said car under control so that collision with other automobiles lawfully crossing Seventh Street at Fourth Avenue could reasonably be avoided."

3.

The defendants filed an answer in which they admit the ownership of the automobile in question, and that Robert Cooling was their agent and servant in the operation of the automobile at the time and place in question. They deny all allegations of negligence on their part and deny that the plaintiff was in the exercise of due care and caution for her own safety, and the safety of her automobile.

The case was submitted to the Court without a jury. At the conclusion of all of the evidence, the Court found the issues in favor of the plaintiff, and assessed her damages at \$500.00. Judgment was entered in her favor for \$500.00 and costs of suit. It is from this judgment that the appeal has been perfected to this Court.

The car was owned and driven by Alice Nelson and with her as her guests were, Amie Thelen, George Nelson and Vernie C. Gustafson, whose testimony is in effect the same. They testify that they were driving west on Fourth Avenue, and as they approached Seventh Street, Alice Nelson stopped her car and waited between three and five minutes before she started across the intersection; that they each looked to their right and left to see if there was any car approaching, and saw none and Alice Nelson then proceeded to cross Seventh Street; that as they were about two-thirds of the way across the Street, Alice Nelson's car was struck by the defendants' car, and the right front fender of the Nelson car, and the left front fender of the defendants' car were damaged. All of the witnesses for the plaintiff testified that the Nelson car was being driven at a rate of speed between five and ten miles per hour. None of the witnesses saw the defendants' car until it was within about thirty feet of them; that in their estimation, the defendants' car was being driven at a rate of speed of between twenty-five and thirty miles per hour.

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Alice Nelson testified on her own behalf. Her evidence was substantially the same as that of the other occupants of the car. She stated that she looked both to her right and left before she started across the intersection, and did not see the approach of the defendants' car until it was practically upon her. She testified to the damage to her car, and also the injuries which she received in the accident, and also the amount of her doctor and hospital bills.

Robert Cooling, the driver of the defendants' car, testified that he started his car on Third Avenue; where it had been parked and turned south into Seventh Street; that in his estimation, he was driving a little faster than twenty miles per hour; that he did not see the Nelson car until he reached the intersection of Seventh Street, and Fourth Avenue; that as soon as he saw the car, he applied his brakes and swerved to the right.

This case presents purely a question of fact which the trial court had to determine from the evidence in the case. As before stated, all of the occupants of the car claimed they looked to the north and did not see any car approaching from that direction until after they had started to cross the intersection. Whether the plaintiff used due care and caution for her own safety, and the safety of her automobile, as she started across this intersection, was decided by the Court in her favor. The elements of speed and the relative position of the cars, as disclosed by the record in this case, were questions for the Court, and he resolved the issues against the defendant, and we would not be warranted in disturbing his findings, as being contrary to the manifest weight of the evidence. The judgment is affirmed.

Affirmed.

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In The
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A.D. 1947

OLLIE GRESSER,
Plaintiff-Appellant,

vs

ALVA GUYAN, ROVER GUYAN,
and CYLE ABELL,
Defendants-Appellees.

appeal from the

Circuit Court

LaSalle County

33144-10

Bristow, J.

On October 7, 1946, the Circuit Court of LaSalle County, Illinois quashed a writ of Habeas Corpus wherein Ollie Gresser, plaintiff-appellant, sought the custody of her nine year old daughter Mary Aleta Abell, who had been in the custody of the child's maternal grandparents, Alva and Rover Guyan. Hence this appeal.

The petition for the writ was in the usual form, and the return thereto alleged that the mother of Mary Aleta, after being awarded the custody of the child in a divorce proceeding, delivered the custody of the girl to the grandparents; that she has failed since that date to discharge her obligations towards the support of the child; and that it is to the best interests of the child to not change her custody and life generally. The father of the child intervened on behalf of the grandparents.

A careful reading of the record in this case and the opinion of the trial judge reveals that there is very little disagreement in the factual phase of this controversy. Appellant Ollie Gresser on March 27, 1935, when she was only fourteen years of age, was married to Cyle Abell. That was before she had completed her elementary schooling. To this marriage was born Mary Aleta on October 12, 1936. The Abells lived with the respondents in Kentucky until they

moved to Illinois, where they continued to reside with them on a small five acre tract of land two miles north of the city of Marseilles, La Salle County, Illinois.

On September 30, 1938, Ollie obtained a divorce decree wherein it was determined that Cyle Abell had been guilty of extreme and repeated cruelty and habitual drunkenness, and that he was unfit to have the custody of Mary Alota. Thereafter, Cyle went back to Kentucky, and, in the following year, found himself another child to marry, this one being only thirteen years of age. To this union, there was born four children, two of whom are in an orphanage and the other two with the mother who obtained a divorce on the grounds of drunkenness and cruelty.

On June 1, 1939, Ollie Abell was married to her present husband, Earl Gresser. Mr. and Mrs. Gresser continued to live with her parents on the little farm, both families making their respective contributions by way of labor and money toward the maintenance of the household. There then was a disagreement, and the Gressers were ordered to leave, whereupon they moved into a small quarters in Marseilles, Illinois. In a short time, the Gressers moved to Peru, Illinois, which was only a few miles away, and there opened a tire shop. In the rear of their place of business, there was partitioned off a three room apartment. There were two boys born to this marriage at that place.

It appears, without the slightest question, that Mr. Gresser is a very fine man. When he opened his tire business in Peru, he had only \$150. Since then, through his thrift and economy, he had made remarkable progress. He has on deposit in a bank in Peru, \$5,000; he owns clear of any incumbrance, a modern six room home; he has in an educational savings account, \$400 for the boys and maintains two policies of insurance which mature in twenty years which is planned to help defray the expenses of a higher education for them; he inherited a piece of property in Rock Island of the value of \$3,000; he draws from the government, \$17.25 monthly for service connected dis-

ability; their family physician and neighbors bore testimony of his character and devotion to his home. Mr. Gresser is anxious to have Mary Aleta to share with his boys the advantages of his home.

Likewise, Mrs. Gresser bears an excellent reputation. She has demonstrated that she is a good mother, and maintains a clean and orderly home. The trial court found in his conclusions that she never intentionally abandoned her child. It appears that she was continually asking her mother about taking the little girl, and that on each occasion, she was "put off" with the explanation, at first, that their quarters where they lived were inadequate and that Mary Aleta would be much happier living with them where she would not be pent up in a small three room apartment. Mrs. Gresser visited her daughter at least once a week, and, although they have contributed but little to her support over this period of years, they have uniformly manifested an affection for the child and a willingness to take the girl when they became economically and otherwise able.

The grandparents, Mr. and Mrs. Guynn, are yet young. She is forty-three, and he is about fifty. They live at the edge of Marseilles in a seven room home which is not modern, and for which they pay \$10 a month rent. With them also resides a son, his wife, and their infant child. Mary Aleta attends a country school situated about a mile and a quarter from her present home. The grandfather is a factory worker, and there is no proof of his having accumulated anything so that this granddaughter may expect any more assistance or any better outlook on life than that enjoyed by her mother. There is no question but what the grandparents are good law-abiding, clean hardworking folks. They have been permitted over this long period of years to develop an attachment for this little girl that is on a par with that beautiful relationship that should exist between any parent and child. The evidence discloses that Mrs. Guynn told her daughter and others that never would she give up this grandchild. The father, Cyle Abell, "hangs around" the respondents home consider-

ably, and has joined with them as an ally in keeping this child from her mother. It would be difficult to contemplate much good to flow from his influence, which is bound to effect his daughter's life as long as he remains there. He has a decided taste or penchant for marrying children; two different courts have condemned him as a drunkard and a wife beater.

The trial judge in his opinion observed that there was a complete absence of testimony that Mrs. Gresser was anything but a good mother, and that Mary Aleta should be with her, but that it was unfortunate that she had been allowed to remain with her grandparents so long that it was the child's desire to remain there, and that it would upset the girl and her grandparents to such an extent that he did not choose to transfer her from one home to the other.

This court is not unmindful of the difficult nature of the decision that he was called upon to make. It was perfectly natural for this ten year old child to express a preference to stay where she has lived all of her life. The grandparents, in their zeal to keep the child, no doubt influenced Mary Aleta in making up her mind. She was continually fettered by her grandmother's domination and control. It has often been said by our courts that it is only in very doubtful cases that the wishes of immature children are to be given any consideration. People v. Roxie, 175 Ill. App. 563, 567, 568; Stafford v. Stafford, 299 Ill. 438, 450; People v. Olive, 250 Ill. App. 601, 616. In the case of Wilson v. Wilson, 111 Pac. 21, the court said: "It is urged that the trial judge found that the child's preference was to stay with its grandparents, we should recognize that preference and let the child remain where it is. But, as was well said by a distinguished judge: 'It seems but a mockery to ask a child of nine years whether it should remain with the persons who brought it up, or go with a stranger.' - - It is of prime importance to protect, so far as possible, the welfare and happiness of this child of tender years from the effects of the loss of respect and affection from its mother." We feel, unquestionably,

that Mary Aleta belongs with her mother, and that the Gresser home in Peru which is now established for her offers infinitely greater opportunities and advantages for her growth, development, education and happiness. The hurt and shock that may come to Mary Aleta and her grandparents is of little consequence or importance when weighed along beside the possibilities of this new life, where there is motherly love, security, comfort and guidance, free from the influence of Cyle Abell, the father, who is without honor or virtue.

It would seem from a reading of the court's opinion, that he recognizes the fact that Mary Aleta should be with her mother, but did not see fit to disturb her emotionally by overruling her request that she be permitted to remain with her grandparents. Repeatedly the court observed, therein, that he would like to enter an order giving the present custody to the respondents with the understanding that they urge more frequent visitation between the child and her mother so that eventually the latter could have the custody of her daughter, and the transfer would be less disturbing. This would be the ideal way of accomplishing a result which the trial judge recognized should obtain. In view of the strained relations that already existed between these litigants, which have not been lessened by this proceeding, it becomes obvious that such a plan would not succeed.

Ollie Gresser was ^{found} ~~found~~ in the divorce proceeding to be a fit and proper person to have and was given the custody of Mary Aleta. She has done nothing in our opinion to forfeit her right to this custody. The trial judge found from the evidence herein that she has continued to be a fine person and an excellent mother, and we find from all the evidence that it is definitely to the best interest of the child that she go to live with her mother.

Many authorities have been discussed by both appellants and appellees in their briefs. Some are similar and many dissimilar to the facts under consideration in the instant case. We do not, in view of the conclusions that we have previously expressed, deem

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it important or necessary to analyze each of them, but suffice it to say that under the law in this state, the court should have entered an order in this case allowing the exclusive custody of Mary Aleta Gresser to Ollie Gresser. People v. Weeks, 228 Ill. App. 262; Kulan v. Anderson, 300 Ill. App. 267, 272; Cornack v. Marshall, 211 Ill. 519, 523; Stafford v. Stafford, 299 Ill. 438, 449; Wilson v. Wilson, (Colo.) 111 Pac. 21; 30 LRA; Wohlford v. Burckhardt (2d Dist.) 141 Ill. App. 321, 326; People ex rel. Yarmulnick v. Hoff, 323 Ill. App. 541, 542; State v. Stell, (1a) 46 S. 215, 216; 16 LRA (NS) 1004; People v. Olive, 250 Ill. App. 601, 616; People v. Hoxie, 175 Ill. App. 563, 567, 568; Stafford v. Stafford, 299 Ill. 438, 450.

Cause reversed and remanded with directions to the trial court to award the writ of Habeas Corpus, and transfer the custody of Mary Aleta to her mother, Ollie Gresser.

REVERSED and REMANDED

The first part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present. The author then goes on to discuss the various factors that have shaped the development of the United States, including the role of the government, the influence of the economy, and the impact of the culture. The author concludes by stating that the study of the history of the United States is a task of great importance, and that it is one that should be undertaken by all who are interested in the future of the country.

AGENDA NO. 26

OCTOBER TERM, A. D. 1946

V.

JOSEPH SIMMS AND GREAT
AMERICAN INDEMNITY CO. OF
NEW YORK, A CORPORATION,
DEFENDANTS-APPELLEES

APPEAL FROM THE
CIRCUIT COURT OF
PEORIA COUNTY

Dove, J.

Joseph Simms was a policeman of the City of Peoria, and Great American Indemnity Co. was his official bondsman. On the night of November 4, 1944 at about one o'clock A.M. he shot Lester Bohannon. The bullet passed through his body and entered that of his wife, lodging in her spine, resulting in almost complete paralysis of both legs. Mrs. Bohannon instituted this suit against Simms and his bondsman to recover her damages on this account with resulted in the jury returning a verdict of not guilty upon which judgment was entered and this appeal followed.

The first ground urged for reversal is that the trial court denied appellant's application for a change of venue from the county, under a petition supported by an attached affidavit of the petitioner's brother-in-law, and by an affidavit of her sister-in-law. Neither of these affidavits as shown by the abstract, alleges that either affiant resides in the county, and a third affidavit for change of venue is attached to the abstract.

affiant resides in Peoria County, This does not comply with the statute, requiring such a petition for change of venue to be supported by affidavits of two residents of the county. (Ill. Rev. Stat. 1945, chap. 146, par. 4). Furthermore there is no showing in the abstract that the petition was filed within thirty days after the return day on which the defendants were required to appear, as required by section 7 of the same act. Taking all the allegations of the petition and the affidavits as true, they do not tend to show any prejudice against appellant by the inhabitants of the county or of those who might be drawn as jurors. The court therefore did not err in denying the petition.

The record shows that upon the night of November 4, 1944 appellant and her husband, who lived in Pekin, had driven to Peoria and attended a picture show. After the show they went to a night club, where they remained until considerably after midnight. After coming out of the night club, appellant's husband wanted to go home and from the testimony of appellant it appears that she wanted to go to another night club. An argument and altercation ensued and her husband struck or slapped her. At this time Simms came along and stopped the altercation without any violence. Later on, when appellant and her husband reached their automobile, they got into another difficulty over the same matter, and Simms testified that as he came up to the automobile appellant came out of it and lit ~~me~~ on her head and shoulders on the side walk; that as he approached, Bohannon got out of the car and said: "I will kill you, you son-of-a-bitch," and reached for his pocket, and that then Simms shot and at that time did not see appellant. The testimony of appellant and her husband as to what took place is not in accord with that of Simms but as ~~a~~ the judgment will be reversed and a new trial awarded

it is not necessary for us to further set out the evidence or consider the refusal of the trial court to submit to the jury a special interrogatory.

It was an error for appellees' counsel to call the attention of the jury in the opening statement to the fact that the husband of appellant had been arrested for assault, and it was error for the court to overrule appellees' objection to the statement. (People v. Newman, 261 Ill. 11, 14; People v. Roche, 389 Ill. 361, 367, et seq.)

The 12th instruction given at the instance of the defendants requires a showing of due care on the part of the plaintiff. There were willful and wanton counts in the complaint and it is so well settled that a showing of due care on the part of the plaintiff is not necessary under a count charging willful and wanton conduct of the defendants as to need no citation of authority.

The 14th instruction told the jury that if they believed that the husband of the plaintiff threatened to kill Simms and made a threatening advance toward him, and that if they further believed that a reasonable and prudent person in his position would have reasonable ground to believe that his life was in danger, Simms "had the right under the law to repel such threatened assault by the use of a deadly weapon, and if in repelling such assault the defendant wounded the plaintiff by shooting her, then such shooting was justifiable and the jury should find the defendant, Joseph Simms, not guilty". The vice of this instruction, as suggested by appellant's counsel, is that it ignores the fact that Simms might nevertheless have been negligent as charged or guilty of willful and wanton misconduct or guilty of assault and battery upon appellant, even though he might have been justified in his conduct toward her husband. There is no evidence that appellant was guilty of or participated in any assault upon Simms. The 14th given instruction was erroneous.

(Paxton v. Boyer, 67 Ill. 132.)

The 15th given instruction is objectionable in that it requires the plaintiff to prove that under the second count Simms maliciously fired his pistol or revolver at Lester Bohannon well knowing the plaintiff was standing within a couple of feet behind him. If Simms knew she was standing two feet behind her husband in the line of his fire, a want of malice toward Lester Bohannon would not excuse negligence as to appellant. There are several instructions which call attention to the fact that the plaintiff must prove her case by a preponderance of the evidence before she can recover. Only one should have been given. There is no occasion to give so many on the same subject.

After the shooting, the policeman Simms went to a telephone and called headquarters, and two detectives immediately came down and took the Bohannons to the hospital. They were gone some time, and after they came back, in searching around the car, they found a pocket knife lying in the gutter close to where Bohannon had laid on the side walk. The knife was admitted in evidence over the objection of the plaintiff. We think objection thereto should have been sustained in the state the record was in at the time this offer was made.

For the errors mentioned, the judgment of the circuit court of Peoria County is reversed and the cause is remanded for a new trial.

Reversed and remanded.

(Baxton v. Lupton, 111. 11. 11.)

The first of the two cases is Baxton v. Lupton.

In the second case, Lupton v. Baxton, the facts are as follows:

The plaintiff, Lupton, was a partner in a firm of

merchants, and the defendant, Baxton, was a partner in

another firm of merchants. The two firms were

connected by a common agent, who was a partner in

both firms. The agent was a partner in the first

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The second case is Lupton v. Baxton.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1947

EARL C. MUETTERTIES
Plaintiff-Appellant

vs.
CITY OF ELGIN
Defendant-Appellee.

38-14-6121
APPEAL FROM THE
CIRCUIT COURT OF
KANE COUNTY

Dove, J.

On July 27, 1946 appellant filed his complaint against the city of Elgin to recover damages for injuries he alleges he sustained on December 19, 1945. The trial court sustained a motion to strike the complaint and from a judgment dismissing the cause the plaintiff appeals.

As abstracted the complaint alleged that the city of Elgin was on December 19, 1945 a municipal corporation and had possession, supervision and control of diverse public streets and sidewalks including the east sidewalk of Spring Street, located approximately in front of the residence and premises designated as 459 North Spring Street in Elgin, Illinois, as to which the defendant had a duty to keep in good, safe condition; that plaintiff in exercise of care for his own safety and as a result of failure of defendant to discharge its duty to keep the sidewalks in safe condition, was severely and permanently injured and has suffered and will suffer great pain and has expended

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and will expend large sums of money; that notice was given to the defendant on May 4, 1946 stating that plaintiff intended "to commence action against defendant and that the accident by which I received such personal injuries occurred on December 19, 1945. At the hour of 10:00 P.M. while walking on the sidewalk in front of or in the vicinity of the residence of Mrs. Ralph Hawthorne, at 459 Spring Street, Elgin, Illinois."

In the trial court and in this court counsel for the city insist that the complaint is defective for two reasons: First, that the statutory notice to the city is insufficient because it did not definitely locate the place of the accident and second, the complaint failed to set forth any facts showing the negligence charged against the defendant.

In our opinion the allegations of the complaint are clearly insufficient to require appellee to answer. It alleges that the east side of Spring Street was in the possession, control and supervision of the City; that the city had a duty to keep it in good, safe condition and that as a result of the failure of the city to discharge its duty in this regard the plaintiff was injured. It is familiar law that a complaint should contain a clear and distinct statement of the facts which constitute a cause of action. It is not sufficient to simply state, as here, that it was the duty of the defendant city to keep its walk in a good safe condition and that it failed to do so. (Putney v. Keith 93 Ill. App. 285; Miller v. Kresge Co., 306 Ill. 104; Overstreet v. Ill. Power and Light Corp. 356 Ill. 378). This complaint does not state any facts showing how or in what manner the city failed in its duty or of what particular negligence the city was guilty or how or in what manner the plaintiff received his injuries.

In appellant's reply brief his counsel state that they

did not in their original brief discuss the second ground of appellee's motion to strike because the circuit court determined that the statutory notice required to be given by appellant to appellee was insufficient and sustained appellee's motion to dismiss on that ground alone.

It is the final judgment of the trial court dismissing this cause from which appellant appeals and the error upon which he relies for reversal is that "the trial court erred in not overruling appellee's motion to strike the complaint."

In view of our conclusion as above stated, it is not necessary for us to consider the sufficiency of the complaint in other respects.

Judgment affirmed.

43066

IRENE B. LEVY,
Plaintiff-Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation, and HERLIHY MID-CON-
TINENT CO., a Corporation,
Defendants.

CITY OF CHICAGO, a Municipal
Corporation,
Defendant-Appellant.

219 A
APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, the owner of four pieces of improved prop-
erty located at 942-46, 941-45, 937 and 845-47 North State
street, Chicago, sued to recover damages to the properties
due to the construction of a subway in and under North State
street, Chicago. Her complaint consisted of three counts. At
the close of plaintiff's evidence the court instructed the
jury to find the issues for defendant Herlihy Mid-Continent
Co., and to find the issues for defendant City of Chicago as
to counts II and III. The jury returned a verdict finding the
issues for plaintiff and against defendant City of Chicago
under count I of the complaint and assessing her damages at
\$15,000. Defendant City of Chicago appeals from a judgment
entered upon that verdict.

To quote from defendant's brief:

"Defendant's Theory of the Case and Errors Relied Upon.

"1. Defendant's position is that even though the several
buildings sustained minor injuries which were capable of repair
by the expenditure of small sums of money, the benefits accruing
to the properties by reason of the construction and operation
of the Initial System of Subways far exceeded any physical
damage and that plaintiff suffered no damages in law.

"2. That the verdict and judgment are contrary to the

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[Faint handwritten notes at the bottom of the page]

For further information, contact:

Mr. J. H. Smith
Director of Research
U.S. Bureau of Census
Washington, D.C.

[illegible]

Scholarship - money given to students who are good at school.

1. *Admission to the program*

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1. The first step is to identify the problem or question that needs to be addressed. This involves understanding the context and the specific requirements of the task.

by the expenditure of small sums of money, the benefits resulting

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and is regulated on a routine "internal" test and system

and of various other persons for the purpose of the same. S.

law and the court erred in denying defendant's motion for a judgment notwithstanding the verdict.

"3. That the court erred in denying defendant's motion for a new trial.

"4. That the court erred in admitting plaintiff's exhibit 16.

"5. That the court erred in denying defendant's motion to strike from the record the testimony of witness Storch.

"6. That the verdict and judgment are contrary to the manifest weight of the evidence.

"7. That the court erred in admitting evidence on behalf of the plaintiff on rebuttal."

As defendant has not argued points 1, 3, 6 and 7, they may be considered abandoned.

The first contention argued is that "the verdict and judgment entered herein are contrary to the law, and the court erred in not entering judgment for the defendant notwithstanding the verdict." A motion for judgment notwithstanding the verdict, like a motion to direct a verdict, is in the nature of a demurrer to the evidence, and the rule is " * * * that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414;

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the alleged activities of the United States in the Philippines.

and have left no higher position.

-adduce 17. 10. 1971
 -adduce 17. 10. 1971

There is no doubt that the holder has no beneficial interest in the property.

made us do not weigh the evidence, - we can do no other at this

which is favorable to appellant. James E. Yeas, 117 W. 444;

McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489.' (Hunter v. Troup, 315 Ill. 293, 296, 297.)" (Rose v. City of Chicago, 317 Ill. App. 1, 12. See, also, Mahan v. Richardson, 284 Ill. App. 493, 495; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597; Olympia Fields Club v. Bankers Indem. Ins. Co., 325 Ill. App. 649, 656.) In support of the instant contention defendant states that the only witness who testified on behalf of plaintiff as to the value of plaintiff's property was Storch, and that "nowhere in his testimony did he refer to the highest and best use of the properties. Nor did he testify as to the fair cash market value of the properties for their highest and best use after the completion and operation of the public work and as affected by it"; that "nowhere in his testimony does the witness give an opinion as to the fair cash market value of the properties giving effect to the construction and operation of the subway," and, therefore, defendant argues, plaintiff failed to make out a prima facie case. Defendant concedes that the witness testified to the fair cash market values of the properties prior to the construction of the subway and after the construction, that he described the defects in plaintiff's buildings that appeared after the construction and testified that these defects had a very definite effect upon the value of the properties; that he testified that the properties were no longer capable of producing the income that they formerly produced. The witness Storch also gave important testimony in rebuttal after defendant's expert witnesses Morrison and Lyons had testified in its behalf as to the enhancement of the values of the properties by the construction of the subway. To quote from the record this rebuttal evidence: "Direct Examination by Mr. Bishop [attorney for plaintiff]. Q. Mr. Storch, have you at

my request given any study to the question of whether these properties in North State Street have been increased in value as of 1940 as a result of the construction of the subway?

Mr. Melaniphy [attorney for defendant]: I object. A. I have. Mr. Melaniphy: * * * He has already covered that in his direct case, and there has been cross-examination with reference to it. Mr. Bishop: This is new matter that they brought out. Mr. Melaniphy: No, he said it is the same, on cross-examination, he said the values were the same in 1940 as at the present time. It is already covered. The Court: He has a right to rebut the testimony of your experts with respect to values. Mr. Melaniphy: He testified to it himself, that is on the direct case, the plaintiff's case. The Court: He has a right to rebut it. He has a right to specifically rebut it if he can. Go ahead. A. There has been no increase in the value of the properties. I heard the testimony of Mr. Morrison and of Mr. Lyons. I will state in my opinion why there has not been any enhancement in the value of this property as a result of the construction of this subway.

"There are various reasons why specific properties have not been enhanced in value; one reason is, * * * that it is strictly a neighborhood center, and the stores are local stores between Chicago Avenue and Division Street, and by their very character indicate they are a neighborhood type of operation. I think there are four National Tea Stores, there are two A. & P. stores; there is a Jewel Tea, there is the State Market, the DeGrassi Brothers, and various other local grocery stores, and cleaners and dyers, bakery stores, lined up along the entire street, and those merchants are relying upon business from the neighborhood, that group about that part of State Street, and they are dependent upon the neighborhood trade. And their reasons,

as I see them, have no bearing on the enhancement of value there. That subway that will run underneath the ground, as that passes by there the people will be riding on the subway underground, and as they pass by underneath State Street they will have no idea what is going on up there. I don't quite see how the traffic is going to have any bearing on the residential trade there, with reference to the markets and these service stores along State Street.

"I have made some investigation of the general character of business on State Street, those markets, and 95 per cent of the trade comes from the area, roughly, within an area of a mile of the stores. I would say that it is true of those stores in there even to a greater degree, the State Market there, which more or less caters to telephone business, and where they are served by direct service, where they have these National Tea Stores, they have the A. & P. stores, and the Kroger's and others, they are dependent upon the people in that area, people who walk there and live in that area, and they don't drive to the stores, and they are within a half a mile or so of the large chain stores such as the A. & P. and National Tea, and it is defined as neighborhood stores there, and they cater to people within a half a mile of the store unless it happens to be a supermarket. I think that is true of the cleaners and dyers, the hardware stores, watch repairing and various other people in the neighborhood there. I have made a great number of leases in that neighborhood probably within the last fifteen years; I have made several hundred leases in that area. I have an opinion as to whether, assuming that the subway is constructed and assuming that trains will operate in that subway, whether the people there in that neighborhood around North State Street and adjoining North State Street, in going back and forth to the Loop, whether they will use the subway or the other existing means of transportation. In my opinion, very

few of them will use the subway, because we are all basically lazy, and I don't think anyone will walk down to the corner of Chicago and State Street, or the corner of Clark and Division, when they can catch a bus right at the very door, or a street car, a State Street car just two blocks west of Michigan Avenue or they can use Michigan Avenue, as the buses do, because that is the central artery. Or take the Clark Street car, take that over to the Loop. You can take the buses there, like I do, where I have had my offices there in the Palmolive Building, and I have seen the flow of buses down here, there is a continuous line of them in the morning, one right after the other, and in the evening, and during the day I suppose they slow down, but they are only five minutes apart. The reason for that is that Michigan Avenue is a central artery, it is the main line for the various buses, coming all the way from Howard Avenue on down, such as the Howard Avenue bus, coming down Lunt Avenue, and then over to Michigan Avenue, and the Devon Avenue bus, the Foster Avenue bus, the Addison Street bus line, the Diversey bus line and the buses on Fullerton Avenue, all the way down to Michigan Avenue, and as a result there is a continuous flow of buses moving down there through that district, beyond that, carrying them on down.

"I have never timed how long it takes to go downtown on the bus, but I would say five or six minutes. I would say the bus would be preferable as a means of communication for a short distance of this kind, because it is easier to go to work that way, it is quicker and easier to go to work, it is a far easier and quicker way to get downtown. I would say a transportation system going downtown which enables a patron of the transportation system to see the road on either side, definitely has an effect over a different kind of transportation, on the rental

value of property or property values, otherwise we would not have been able to rent the signboards to the Outdoor Advertising Company there or for as much as \$500 a month, at the Palmolive Building, the First National Bank paying \$500 a month for a signboard on the Bendix property there.

"I am quite familiar with the development at the Chicago Avenue station of the elevated. That development is a group of buildings, largely commercial or industrial type, and directly across the street from the Chicago Avenue elevated station is a gasoline station, on the southwest corner of Franklin and Chicago Avenue is the Hathaway Coffee Roasting & Packing Company; next door to that is the Morgan & Ferrell Distributors, distributors of Schlitz beer; and then there is a parking lot, and then comes Orleans Street, across the street, a general printing shop there, occupying a seven-story industrial building, on the south side of the street; and on the north side of the street as you get off the elevated there is a small United Cigar store, about 15 or 20 feet, and next is a greasy spoon type restaurant, a very insignificant restaurant; then several vacant stores, and there is a third rate hardware store and resale shop, and shops and stores of that general character. They have been there as long as I can remember. Then there is also a shop that has been abandoned now, that is used as a boat shop, for the display of boats, and at the southeast corner of Franklin and Chicago, a used plumbing shop, and then the Fox tobacco jobbers, in a four or five-story building.

"The property near the station has apparently not derived any benefit from the proximity to the elevated lines, and the fact that there are express and local trains running there to the Loop, because the store there rented for \$35 a month for a normal 18-foot store.

"We manage and operate the property at the northeast

corner of Clark and Division for the Spoor estate. The building was built in 1941, the old building was torn down and a new building was put up, and there is now one vacancy we have had since last May 1st, and rented the store to a hand laundry, and that has been vacant since the building was built in 1941.

"There is a furrier in there, and the Kent Cleaners & Dyers, and a bakery, the O. B. Bakery, and we have vacant stores, and a store that sells sample shoes; there are a total of nine stores in the building. They are typical neighborhood stores. That have been built since 1941.

"We manage the Bonfig property, to the northwest corner; that was sold in 1942 for \$85,000. I am familiar with the property at the southeast corner of Division and State; that was sold for a hundred thousand. That deal was recorded on April 15, 1937; that was prior to the construction of the subway. It was improved with a group of buildings, a group of one and partial two-story frame and brick buildings in very dilapidated condition. I think the improvements were considered valueless through disuse and lack of maintenance or care. That would be 7,704 square feet.

"The property at State and Elm is the Bonfig property - occupied by Bonfig, where Bonfig had a grocery; it is a five-story brick building, that occupied 24 feet frontage on State Street and adjoined that part of the building in [and] the connecting building is an apartment building, three-story court building, stores facing on State Street; that is a three-story building, an apartment building. That sold for \$85,000 including land and building.

"In my opinion the value of the property on North State Street between Chicago Avenue and Division Street definitely has not increased, as evidenced by these sales. It has decreased."

Plaintiff's properties are all on North State street

between Chicago avenue and Division street. In its argument in support of the instant contention defendant does not refer to the uncontradicted evidence of plaintiff that as a result of the construction of the subway she was compelled to rent the properties at greatly reduced rents.

In our opinion the trial court did not err in refusing to enter judgment non obstante veredicto for defendant.

Defendant contends that "the testimony of Mr. Storch should have been stricken for the reason that his opinion on values included elements not recognized by law as proper." It appears from the record that no objection was made as to any part of the testimony of the witness Storch during his direct examination and it was not until after all of the evidence was in and both sides had rested that "the defendant made a further motion [oral] to strike from the record the testimony of Witness Storch, on the ground that it is incompetent, irrelevant and immaterial and not in accordance with the rules of law based upon any foundation to make him qualified." It will be noted that this objection did not include the ground that Storch's opinion on values included elements not recognized by law as proper. "Objections to testimony should be made in apt time and failure to seasonably object cannot be availed of when raised too late. If a party desires to call in question the admissibility of testimony it is his duty to object in apt time to obtain a ruling of the court. (Board of Trade Telegraph Co. v. Blume, 176 Ill. 247.)" (Goldberg v. Capitol Freight Lines, 382 Ill. 283, 291.) "A specific objection to evidence, based solely on a particular point, is a waiver of objections on all other points not specified or relied on. (Village of Prairie du Rocher v. Schoening-Koeningsmark Milling Co., 248 Ill. 57.) A party who seeks to exclude a piece of evidence should be explicit,

and disclose to the trial court all defects in the proposed proof which he expects to urge upon this court in the event of an appeal. After the evidence was closed, a motion was made to strike out the testimony of this sale because it was not a free and open sale, because of the difference in time between the date of the sale and the filing of the petition, and because of the change in the real-estate market during that time. These objections to the proof of the sale were then too late. An objection to testimony, to be availed of in this court, must be raised in apt time, when the evidence is introduced. Goldberg v. Capitol Freight Lines, Ltd., 382 Ill. 283; Board of Trade Telegraph Co. v. Blume, 176 Ill. 247." (Forest Preserve Dist. v. Lehmann Est., 388 Ill. 416, 429, 430. Italics ours.) In the instant case, as counsel for plaintiff argues: "If a timely and specific objection to Storch's testimony was made, plaintiff's counsel would have been enabled to bring out, on re-direct examination, what percentage or portion, if any, of the depreciation in value of plaintiff's property the witness attributed to factors other than the construction of the subway." A fortiori, defendant's motion was to strike the entire testimony of Storch, and defendant does not and cannot contend that all of Storch's testimony was incompetent. Defendant, during the trial, did not raise the point it now makes in the instant contention, and the oral motion to strike Storch's testimony was plainly a perfunctory one, and the grounds urged were of the most general character. Defendant's argument that its motion to strike Storch's testimony fairly apprised the trial court and counsel for plaintiff that the testimony of Storch should have been stricken for the reason that his opinion on values included elements not recognized by the law as proper, finds no support in the record. The present contention of defendant is a mere afterthought. We may add that by instruction 12, given at the request of defendant, the jury was expressly

instructed to ignore any testimony of depreciation and value due to factors not connected with the subway construction, and by the same instruction, and also by instruction 9, the jury was expressly instructed that "fair cash market value" included its "highest and best use."

Defendant contends that "the court erred in admitting in evidence plaintiff's Exhibit 16." It argues that "the exhibit depicts a condition that existed in front of 935 and 937 N. State street during the progress of the work. It depicts a temporary condition showing interference in accessibility to the premises of the plaintiff. It is highly inflammable, prejudicial and under the law plaintiff would not be entitled to recover damages due to any inconvenience to the customers of her tenants." Plaintiff's Exhibit 16 is a photograph of one of the damaged buildings taken during the construction of the subway, and the court admitted it solely for the purpose of showing to the jury the proximity of the excavation to the building in question. At the request of defendant the court gave to the jury the following instruction: "The plaintiff is not entitled to recover damages for any temporary interruption of business, if any, or any temporary loss of rentals, if any, during the time the public work was being carried on." Plaintiff introduced in evidence 31 other photographs of the properties and defendant introduced in evidence 26 photographs. The contention of defendant that the admission of plaintiff's Exhibit 16 constitutes reversible error is without merit.

Defendant contends that "the verdict is clearly excessive." It argues that the rules for determining damages in a case like the instant one are the same as those that govern condemnation cases, and it cites a number of cases that support its argument. "It is a well settled rule of this court that the damages awarded

"It is a well settled rule of this court that the
case, and it cites a number of cases to support the
the instant one and the same is the same in this
It is also the rule for the purpose of this
statement made in the case of the instant one.

by a jury in a condemnation proceeding will not be disturbed where the evidence is conflicting, the jury views the premises and the amount of compensation fixed by it is within the range of the evidence. (Jefferson Park District v. Sowinski, 336 Ill. 390.) * * * The evidence was conflicting and the question was therefore properly left to the jury. (River Park District v. Brand, 327 Ill. 294; Kankakee Park District v. Heidenreich, supra [328 Ill. 198].) The jurors saw the witnesses, heard their testimony and observed their demeanor. * * * Where there is a diversity of opinion and conflict of testimony, the value of the testimony of the different witnesses, based upon their opportunity for observation, their intelligence and experience, is a question for the jury. Chicago and Evanston Railroad Co. v. Blake, 116 Ill. 163." (Illinois Light and Power Co. v. Bedard, 343 Ill. 618, 629.) In the instant case the court permitted the jury to view the subway and plaintiff's properties in order to enable the jury to understand the physical situation, but he instructed the jury that their view of the subway and plaintiff's properties was not to be regarded by them as evidence in the case. The evidence bearing upon the question of damages is voluminous. This case was tried by an able and experienced judge (Judge Feinberg), and in the opinion he gave when he denied a new trial to defendant he stated that the verdict was not excessive. It must be noted that defendant makes no complaint as to any instructions given or refused and that it makes no charge of any misconduct during the trial of the cause. That the construction of the subway would greatly benefit certain properties is not and cannot be disputed, but defendant in the instant case fails to recognize the patent fact that because of the particular location of plaintiff's properties and the nature of the neighborhood in which they are situated, the properties sustained very little, if any, benefit from the

construction of the subway. That a public improvement beneficial to many property owners may not be beneficial to some property owners, and may even be harmful to certain property owners, see Boulevard Bridge Bank v. City of Chicago, 304 Ill. App. 190. We are satisfied that we would not be justified in sustaining the instant contention of defendant.

Defendant has had a fair trial and the judgment of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

220

Appellee,

V.

Appellant.

COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint at law under the Federal Employers' Liability Act against defendant to recover for injuries sustained by him in an accident while he was employed as a locomotive fireman in defendant's yards at East Joliet, Illinois. Defendant filed a verified motion to dismiss plaintiff's complaint, in which it sets up a release signed by plaintiff and defendant. Plaintiff then filed a "separate action in chancery," to have the release set aside. The equitable branch of the case was transferred to the equity side of the court and was tried before Judge John C. Lewe, who, after hearing evidence, entered a decretal order that the release be declared null and void and of no force and effect "and is hereby cancelled." Defendant appeals from that order.

Defendant's motion to dismiss is as follows:

"Now comes the defendant * * * and moves to dismiss plaintiff's action for the reason that the plaintiff on or about April 19, 1944 for a valuable consideration, the receipt whereof was acknowledged by him, executed a written release of all claims and demands which he had against said defendant on account of all injuries received by him in any accident or accidents which may have happened before the signing of said instrument and also especially on account of all injuries received by him in an accident which happened on or about the 7th day of April, 1944, at or near Joliet,

JOHN J. JENNINGS

Appellee

v.

INDIAN, POLICE AND RAILROAD
RAILWAY COMPANY, a corp-
oration,
Appellant.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint at law against the defendant

Employers' liability for damages sustained by him in an accident while he was employed

injuries sustained by him in an accident while he was employed

as a locomotive engineer in defendant's service at that time.

Defendant filed a verified motion to dismiss plaintiff's

complaint, in which it sets up a release signed by

plaintiff and defendant. Plaintiff then filed a "response"

to the motion to dismiss, in which it sets up a release signed by

equitable branch of the case was transferred to the equity

side of the court and was tried before Judge John D. Lewis,

who, after hearing evidence, entered a verdict in favor of

the release he declared null and void and of no force and

effect "and is hereby cancelled." Defendant appeals from

that order.

Defendant's motion to dismiss is as follows:

"Now comes the defendant * * * and moves to dismiss

plaintiff's action for the reason that the plaintiff on or

about April 19, 1944 for a valuable consideration, the

receipt whereof was acknowledged by him, executed a written

release of all claims and demands which he had against said

defendant on account of all injuries received by him in any

accident or accidents which may have happened before the

signing of said instrument and also especially on account

of all injuries received by him in an accident which happened

Illinois, being the cause of action referred to in plaintiff's complaint, all of which more fully appears from the affidavit attached hereto and made a part hereof." (Italics ours.)

Attached to the motion is an affidavit of defendant's claim agent, Oscar F. Gnadinger, which avers that plaintiff executed and delivered to defendant a certain written release, a photostatic copy of which is attached to the affidavit, and that in consideration of the execution and delivery of said release to defendant it delivered to plaintiff its check for \$106 "in full settlement for personal injuries as per release"; that said check was accepted by plaintiff and cashed by him.

Also attached to the motion are a photostatic copy of the alleged release and a photostatic copy of a check for \$106 executed by defendant company and made payable to plaintiff. The release, apparently a form release used by defendant's claim department, recites that plaintiff, in consideration of the sum of \$106, "does hereby release and discharge said Company from all claims and demands which he has against said Company on account of all injuries received by him in any accident or accidents which may have happened before the signing of this contract of settlement, and also especially on account of all injuries received by him in an accident which happened on or about the 7th day of April A.D. 1944, at or near E. Joliet, Illinois, and which resulted in injuries to him and whether or not such injuries or their extent are known to him.

"This contract of settlement contains all the agreements between the parties.

"Said John J. Sullivan acknowledges that said sum of One Hundred Six and no/100 Dollars (\$106.00) has been paid to him.

"Signed and sealed at Joliet, Illinois, this 19th day of April A. D. 1944.

"ELGIN, JOLIET AND EASTERN RAILWAY COMPANY (SEAL

"By O. F. Gnadinger

"John J. Sullivan

(SEAL"

(Italics ours.)

Plaintiff's Separate Action in Chancery alleges:

"1. That on or about the 19th day of April, 1944, at Joliet, Illinois, the plaintiff affixed his signature to a certain document presented to him by the defendant, or some one acting on its behalf, which said document purported to be a release and purported by its terms to release, among other things, any and all claims and demands which the said plaintiff had against the defendant, ELGIN, JOLIET AND EASTERN RAILWAY COMPANY; any and all claims or demands which the plaintiff had against the defendant on account of all injuries received by the plaintiff in any accident or accidents which may have happened before the plaintiff signed said contract of settlement and said release purported to release especially on account of injuries received by the plaintiff in an accident which happened on or about the 7th day of April, 1944, at or near Joliet, Illinois; and as alleged more fully in the common law count herein said accident occurred as the direct result of the negligence of the defendant * * * while the said plaintiff was in the exercise of ordinary care for his own safety.

"2. That the total consideration paid to the plaintiff for the execution of said release was the sum of One Hundred Six Dollars, and the plaintiff hereby offers to repay to the defendant the said sum of One Hundred Six Dollars, and hereby states he is ready and willing and able to repay the said sum of \$106.00 at any time before the trial of the issues herein. The said sum of One Hundred Six Dollars, was allocated to or intended to be compensation to said plaintiff for his loss of time from work as a result of the said accident and no part of the said One

Hundred Six Dollars, was allocated to or intended to be compensation to the said plaintiff for injuries sustained by the said plaintiff.

"3. That prior to and at the time said release was executed by said plaintiff the defendant, *** by its duly authorized agent acting for it and by a certain physician who examined the said plaintiff, said physician acting on behalf of the said defendant and having been employed by the said defendant and having been directed by the said defendant to examine and treat the said plaintiff, informed the said plaintiff and led him to believe, at the time that said release was executed, that he had sustained no serious injuries in said accident; that he was able to return to work on April 19, 1944; that he should take it easy for a few days and that he would be all right; and that the said plaintiff executed said release and delivered the same relying upon the truth of the representations of the said agent and of the said physician, and believing, as he was led to believe, that he sustained no serious injuries in said accident.

"4. That said representations of said agent of the defendant and the said physician were not true or correct, and the plaintiff executed the said release and the defendant accepted the same under a false, mistaken impression as to the actual condition of said plaintiff and as to the injuries he had actually received in said accident; and that the fact was that he did and had actually received serious head and brain injuries causing subsequent headaches, dizziness, nausea, weakness, and inability to work, and causing subsequent pain and suffering and mental disturbances; and that the conditions which then existed were not known to said plaintiff at the time he executed said purported release; and that subsequently because of said injured condition, he suffered dizziness, head-

Hundred Six Dollars, was allocated to or intended to be allocated to the said Plaintiff for injuries sustained by the said Plaintiff.

19. That prior to and at the time said release was executed by said Plaintiff the Defendant, and by the only authorized agent acting for it and by a certain physician who examined the said Plaintiff, a false statement was made on behalf of the said Defendant in having been signed by the said Defendant and having been inserted in the said Defendant to examine and treat the said Plaintiff, before the said Plaintiff and to inform him of the said Plaintiff's release was executed, that he was not acting as a doctor in said accident; that he was able to perform his duty on April 19, 1944; that he should make it easy for the Plaintiff and that he would be all right; and that the said Plaintiff or would said release and delivered the same relating upon the basis of the representations of the said agent and of the said physician, and believing, as he was led to believe, that he sustained no serious injuries in said accident.

"4. That said representations of said agent of the Defendant and the said physician were not true or correct, and the Plaintiff executed the said release and the Defendant accepted the same under a false, mistaken impression as to the actual condition of said Plaintiff and as to the injuries he had actually received in said accident; and that the fact was that he did and had actually received serious head and brain injuries causing subsequent headaches, dizziness, nausea, weakness, and inability to work, and causing subsequent pain and suffering and mental disturbances; and that the conditions which then existed were not known to said Plaintiff at the time he executed said purported release; and that subsequently be-

aches, nausea, weakness, pain, suffering, mental disturbances and general disabilities of various natures; that said condition causing said dizziness, headaches, nausea, weakness, pain, suffering and mental disturbances was a concussion of the brain; and that said condition had a direct and causal connection with the accident of the 7th day of April, 1944, and existed at the time of the execution of the release herein described and that by reason of said condition the said plaintiff was unable to work for a long period of time with the exception of ten days during which time said plaintiff attempted to perform his usual duties but was unable to continue to do so because of his said condition and said plaintiff was forced to be treated by a physician for a great period of time and thus incurred various and sundry bills of considerable amount of money; that the said plaintiff had he known of his said condition on the 19th day of April, 1944, would not have executed said purported release without adequate consideration therefor; that said plaintiff was not in any way negligent in relying upon the representations of the agent of the said defendant and of the physician of the said defendant.

"5. That said representations of the said agent of the defendant and the said physician of the defendant as to the extent of the plaintiff's injuries were not true or correct but were false and fraudulent and made with the intent to deceive the said plaintiff and to induce the said plaintiff to execute the said purported release; that the said plaintiff had he known of his said condition would not have executed said purported release without adequate consideration therefor; that said plaintiff was not in any way negligent in relying upon the said false and fraudulent representations of the said agent of the defendant and the said physician of the defendant.

"6. That accordingly said purported release in so far as it relates to the said plaintiff is void or voidable at the

instance of the plaintiff because the same was executed by the plaintiff either as a result of a mutual mistake of fact or because of the false and fraudulent representations of the defendant; and that if said purported release is not cancelled but is allowed to remain in full force and effect the plaintiff will suffer damages by being deprived of his legal right to recover adequate damages from the defendant for his said injuries; that said defendant should not be permitted to take advantage of the fact that plaintiff's name is signed to the instrument in question; and that in equity and good conscience said purported release in so far as it relates to the plaintiff should be rescinded, cancelled, set aside and held to be null and void and of no force and effect; that a copy of said purported release is filed here as part of a motion to dismiss said cause * * *.

"WHEREFORE, plaintiff herein prays judgment that this court will decree that said purported release in so far as it purports to release any claims, actions or causes of action which the said plaintiff may have against the said defendant is void and of no force or effect; and further that this Court will order said purported release to be delivered up by the said defendant for cancellation; and plaintiff further prays that the Court may allow such other and further relief as in the premises may seem meet."

Defendant's answer to plaintiff's separate action in chancery is as follows:

"1. * * *

"2. Defendant admits that the total consideration paid to the plaintiff for the execution and delivery of said Release is the sum of One Hundred Six Dollars; defendant denies the remaining allegations of Paragraph 2 of plaintiff's Separate Action in Chancery.

"3. Defendant admits that its physician who examined and

treated the plaintiff advised the plaintiff that he was able to return to work on or about April 19, 1944; defendant denies the remaining allegations in Paragraph 3 of plaintiff's Separate Action in Chancery; defendant specifically denies that plaintiff executed the release in question in reliance upon any representations made by any agent or physician of the defendant.

"4. Defendant denies the allegations of Paragraph 4 of plaintiff's Separate Action in Chancery.

"5. Defendant denies the allegations of Paragraph 5 of plaintiff's Separate Action in Chancery.

"6. Defendant denies the allegations of fact and conclusions of law alleged in Paragraph 6 of plaintiff's Separate Action in Chancery, and denies that the plaintiff is entitled to any relief as prayed for." (Italics ours.)

The accident happened on April 7, 1944. Plaintiff was then about fifty years of age and had worked for defendant continuously since 1909 or 1910 as a locomotive fireman. He acquired seniority rights in 1917. Prior to the accident in question he had had two accidents during the many years of his employment, but after each he went back to work after a few days' lay-off. For ten years prior to the accident he lived at New Lenox, Illinois, where he had a place that contained seven acres, and sometimes, in addition to his regular railroad work, he did light farming upon the place. He always passed the annual physical examinations held by defendant; the last one was made in February, 1944. Plaintiff was five feet eleven inches in height and at the time of the accident weighed two hundred and twenty or two hundred and twenty-two pounds. His health prior to the accident was "perfect," and the evidence tends to show that he was a strong man. His working hours were from 8 o'clock A. M. to 4 o'clock P. M., during which time, as part of his duties, he shoveled soft coal with a scoop into the firebox.

We will first pass upon the merits of the ground set forth in paragraph 2 of plaintiff's separate action in chancery, that the sum of \$106 that was paid him on April 19, 1944, by defendant "was allocated to or intended to be compensation to said plaintiff for his loss of time from work as a result of the said accident and no part of the said \$106 was allocated to or intended to be compensation to the said plaintiff for injuries sustained by the said plaintiff": Plaintiff went to defendant's claim agent, Gnadinger, on April 19, 1944, because defendant's physician, Dr. Matt Bloomfield, told him he was able to go to work and gave plaintiff a "return to work" slip. Plaintiff testified that he did not ask for a settlement for the damages he sustained in the accident. What occurred at the time the "release" was executed on that date clearly appears from the testimony of defendant's witnesses Oscar F. Gnadinger, chief claim agent of defendant, and H. E. Pasold, who worked under Gnadinger. Pasold testified that plaintiff came into the claim department on April 19, 1944, "with a discharge slip from our company surgeon, Dr. Bloomfield"; that after Gnadinger arrived plaintiff went into the latter's office and "in five or six minutes Mr. Gnadinger came out and told me to give Mr. Sullivan his time. I figured his time and told Mr. Sullivan what it was and he said 'O.K.'" Upon cross-examination the following

occurred: "Q. You said, Mr. Gnadinger, I believe, told you to figure up Mr. Sullivan's time. A. Yes. Q. What did you mean by that? A. That means wages for the days that he was off duty from the time that he was injured until the date that he had the discharge slip. Q. And that was about twelve days? A. About twelve days, yes, sir. Q. And you figured up that time? A. I figured it up. Q. That came to about \$106.00, wasn't it? A. that is right. Q. And that is what you put in the release? A.

Yes, sir. Q. And you paid him just for the time, that was all, that is the consideration that was given in the release?

A. That is right." At this point the court took up the examination of the witness, and the following occurred: "The Court: * * * You paid him for his time? Mr. Jones [attorney for plaintiff]: The time that he was off. The Court: Is that correct? Mr. Jones: That is all. The Witness: That is right.

The Court: You computed the time he was off? The Witness: That is right. The Court: And you paid him for that? The Witness: That is right. Mr. Jones: Q. And nothing more?

A. No, sir." The following is Mr. Gnadinger's testimony upon the subject: "I looked first at the surgical report [the report of Dr. Bloomfield], and I asked Mr. Sullivan why it had been necessary for him to remain from work twelve days with what appeared to be a very minor injury. He replied that he hadn't felt able to work. He stated also that he had been going to the doctor regularly, and I asked him -- I posed a few questions, I know I discussed the accident with him, the cause of the accident. And I said to him, 'Well, John, I suppose you want your time.' And he said, 'Yes, that will be all right.' I said, 'Are you able to go back to work now?' He replied that he was. I said, 'Well, your twenty-seven years of service anyhow would entitle you to your time for the twelve days you have lost.' I said, 'Come outside with me.' And I took him to Mr. Pasold's office and told Mr. Pasold to figure Mr. Sullivan's time for twelve days and pay that to him." Plaintiff testified that Pasold asked him what was his rate of pay, and that plaintiff told him \$8.82 a day; that Pasold then said that he had figured up the amount of pay due for the twelve days and it amounted to \$106. Pasold then drew up three copies of a "form release" and had plaintiff sign them.

The testimony proves beyond a reasonable doubt that plaintiff received nothing from defendant for any damages that he sustained in the accident and that he was entitled to payment of his wages for the twelve days that he lost on account of the accident because, as Gnadinger testified, "Your twenty-seven years of service anyhow would entitle you to your time for the twelve days you have lost." It is settled that a release like the one in question must be based upon a valuable consideration. Defendant's motion to dismiss plaintiff's action at law alleges that the release was based upon a valuable consideration, and the affidavit, in support of the motion, avers: "that in consideration of the execution and delivery of said release to the defendant said defendant delivered to the plaintiff its check for \$106 'in full settlement for personal injuries as per release,' * * *." The release was under seal. "Such a release carries with it the presumption that it was executed for a valuable consideration, and no evidence can be introduced for the purpose of showing that there was no consideration for the giving of the instrument. To do so would be to permit one to deny his receipt of the consideration expressed for the purpose of making void a sealed instrument, which under the law in this State is not permissible in any case. Before such an instrument can be impeached for fraud relating merely to the consideration and not to its execution, resort must be first had to a court of equity to set it aside for such fraud. (Papke v. Hammond Co., 192 Ill. 631; Jackson v. Security Life Ins. Co., 233 id. 161; Robinson v. Yetter, 238 id. 320.)" (Woodbury v. U. S. Casualty Co., 284 Ill. 227, 234. Italics ours.) Here, the plaintiff resorted to a court of equity to set aside the release. A fortiori, we have here a case where defendant's testimony impeaches the release. Defendant's attempt to sustain the release in the teeth of its own evidence

indicates a determined intent to defraud plaintiff by means of an invalid instrument. We hold that plaintiff received no compensation from defendant for the injuries he sustained. This holding, alone, if sound, justifies the action of the trial court in setting aside the release. However, we have decided to consider the point urged by defendant that "the finding that the release was executed under a material mistake of fact is contrary to the evidence"; that "the burden was on plaintiff to prove his case by clear and convincing evidence," and that "plaintiff has failed to prove by clear and convincing evidence that he received a brain injury." Defendant states that "if the competent evidence is clear and convincing that the plaintiff did in fact have a severe brain injury, of which both he and the defendant were unaware at the time of the settlement, then the plaintiff is entitled to have the release set aside and the order appealed from is correct; but if, on the contrary, the evidence leaves a well-founded doubt and points with equal force to the conclusion that plaintiff's complaints of headaches, dizziness and weakness stem from an anxiety neurosis, a belief that he was injured, when, in actual fact, he has no brain injury, then he is not entitled to set aside the release and the order appealed from must be reversed." The consideration of this contention requires a further statement of facts and circumstances in evidence:

On the day of the accident there was a student fireman on the engine who was to be instructed by plaintiff how to fire a locomotive. Plaintiff testified that they went down to switch cars in the north end of F Yard, making up and breaking up trains; that the student fireman was sitting on the seat box and plaintiff was standing in front of the fireman; that they went in on Track F-1 in F Yard, coupled into eight cars and shoved them down the track in order to pick up more cars, when "all of a sudden the air went on the locomotive and the wheels started to slide," but

The first part of the report deals with the general situation of the country and the progress of the work of the various departments. It is followed by a detailed account of the work of the different departments, and then by a summary of the results of the work of the different departments. The report is divided into three parts: the first part deals with the general situation of the country, the second part deals with the progress of the work of the various departments, and the third part deals with the results of the work of the different departments.

as no warning was given by the engineer plaintiff put his head out of the window to see what was wrong, and that as he did so the crash came; that "they hit our cars" as "I had my head out the fireman's window on the left side of the cab"; that the steel frame on the cab window hit his head; that he grabbed his head with his hand to hold his head and the student fireman said, "You are bleeding"; that he then saw that his hand was all blood; that when the train stopped he told the engineer that he was hurt and was bleeding, and the engineer told the foreman that plaintiff was hurt; that the foreman said, "We are going to back up and go to dinner," and they did so; that plaintiff called for another fireman; that after he received the injury he did no more physical work that day; that immediately following the accident his head was numb and dizzy, but he was conscious; that for about five or ten minutes after the accident he did not move, and just held his head with his hands; that after he got off the locomotive he went to the round house to get a paper to get medical aid from the hospital and then went to the Silver Cross hospital, where defendant's employees who are injured are taken care of; that at the hospital he saw a nurse, Miss Ekland, employed by defendant, and she washed his wound, gave him a drink of water, and told him to rest a while; that she then bandaged his head where he was cut and gave him some medicine; that he did not see a doctor that day; that after he left the hospital he went home and lay down; that he was "dizzy with headaches," did not eat anything and had no appetite; that he was nauseated; that about eleven o'clock the following morning he went to the hospital and saw the same nurse, who told him to go and see Dr. Bloomfield, defendant's regular doctor; that he was suffering from weakness and headaches and had passed a restless night; that the next day, April 8, he saw Dr. Bloomfield, who asked him how he got hurt and how he felt, and told him to continue taking the tablets the nurse gave him whenever

he got headaches, and to take it easy and he would be all right; that the doctor just felt the back of his head where the nurse had put some kind of bandage or dressing. Plaintiff further testified that the wound he received was two inches long and it was one and a half inches behind the right ear; that it made a cut; that he went home after seeing the doctor and had to lie down; that he was weak and restless; that he had pain where he was hurt in the back of his head and the pains were going upward; that he saw the nurse again on the 10th or the 11th of April and she told him to continue taking the pills and she gave him more of them; that he saw Dr. Bloomfield again at the hospital on the 10th or the 11th; that he met the doctor in the hallway outside the dispensary and the doctor asked him what he was there for, and he told the doctor he was the man who was hurt on the 7th; that the doctor made no examination at that time but told him to continue taking the pills and to get all the rest he could; that he went home, felt tired and wanted to lie down, and for two nights thereafter he was restless; that he saw Dr. Bloomfield three times at the hospital and seven or eight times at his office; that the doctor told him to continue to take the pills; that they were aspirin; that the doctor was defendant's physician and he paid him nothing for his services; that on April 18 or 19 he had a talk with the doctor; that the doctor asked Miss Ekland how long plaintiff had been off and she stated that he got hurt April 7, and the doctor came to plaintiff and wanted to know why he was not working; that he said to the doctor: "Doctor, you just told me the other day that I was to take it easy for a while and continue taking those pills"; that the doctor gave him a regular form to go back to work and said he would be all right in time; that he then went back to work and tried to do his work, but that he had not power enough to do it properly; that when he would bend down with the

scoop shovel he would have to hesitate before he could pass the coal from the coal tender to the firebox because he got a dizzy spell when he stooped down; that he could not take the signals properly; that he had never experienced anything like that before the accident; that he had headaches and dizziness during the twenty days that he attempted to work and the condition kept getting worse; that he saw double, and for that reason asked the engineer to relieve him from taking the signals; that he was compelled to quit work at the end of twenty or twenty-one days because he saw it was not safe for him to continue to work, and when he shoveled coal he got sick; that when he was on the locomotive he had headaches and dizziness continuously; that he could not handle the scoop and at times he would tumble, "like making a nose dive into the coal"; that the last time he worked was on May 13 and that he then saw Dr. Bloomfield, who told him to continue to take the pills and he would be all right in time; that he went to see Mr. Gnadinger and told him he ought to have better medical care and that he was going to see another doctor; that Gnadinger told him, "We will take care of you"; that his headaches and weakness were getting worse all the time and that he talked to Mr. Gnadinger about his condition; that in June they had him go to Silver Cross hospital to be X-rayed; that Dr. Bloomfield sent him to Dr. Lennon on June 24; that Gnadinger said that Dr. Lennon told him that plaintiff had ear trouble; that Gnadinger made an appointment for plaintiff to see Dr. Davis, in Chicago; that after Dr. Davis examined him in the Passavant hospital Gnadinger told plaintiff Dr. Davis informed him that "it was imagination on my part of these headaches and dizziness"; that on June 2, he went, of his own volition, to see Dr. Johnson, who gave him a number of examinations; that in December he felt worse and Dr. Johnson had him go to the hospital, where he stayed forty-two days; that he has seen Dr. Johnson

once a week since he left the hospital and Dr. Johnson still prescribes medicine for him; that at the time he was testifying he had severe headaches, dizziness and weakness; that the headaches start behind the right ear where he was hurt, and go upward; that he felt the headaches right after he was struck in the accident; that he cannot stand a trip by bus, train or street car and when he gets off a bus he has to sit in the bus station a half hour before he can get his bearings to walk to the place he wishes to go; that before the accident he "was in perfect health"; that he had his head out of the window when the impact occurred and he bumped his head against the front side of the window as the engine came back; that on April 19, when Dr. Bloomfield told him he was able to go to work, he told the doctor he thought he ought to be X-rayed, and the doctor wanted to know who told him that.

The position of defendant in regard to the ailments plaintiff claimed he had is an unusual one. It does not contend that plaintiff is a malingerer nor that his testimony in reference to his claimed ailments is false. Dr. Bloomfield conceded that if the ailments that plaintiff claimed he had were real they were serious. The position that defendant takes is based practically upon the testimony of Dr. Bloomfield that while plaintiff thought he had a severe injury to his head and that there was a lot wrong with him he was really "suffering from a sort of hallucination of the brain, thinking that he was injured. Now, if you want to know exactly what I think he was suffering from, imaginings of his own self that he was injured, probably." To quote further from the testimony of Dr. Bloomfield: "Q. What hallucinations did he have? A. That there was a lot wrong with him, that he had a severe injury to his head, that there was a lot wrong with him. Q. And you think that was a hallucination? A. In my

opinion it was, yes, sir. * * * I told you I thought he was suffering from hallucinations of a severe injury, that he thought he had them. Q. But you didn't think he had any injury? A. Why, no. I have testified to the fact that I didn't think he had any of the injuries, I testified to it. * * * Q. In a case, then, that is a true psychoneurosis, where a man believes that he has got injuries, that is just as detrimental to him as if he did have it, isn't it? A. Well, there are different degrees of psychoneurosis, of course, and men do get to thinking there are things wrong with them, and it is bad for them, we would say, yes, it makes them sick. They are sick mentally. They are sick mentally. Q. It affects them physically in just the same manner as if they had that kind of a disease, does it not? A. No, no, not exactly as if they had that kind of a disease, but it does affect a man physically if he thinks he is sick long enough, it affects him physically, yes, sir. * * * I thought he was suffering from a type of neurosis, that he thought he was hurt bad, yes, sir." Plaintiff's work required a strong body and a clear mind. Hallucinations usually arise from a serious disorder of the nervous system and generally indicate a mental disturbance, and yet, in spite of the statements of plaintiff to Dr. Bloomfield as to his ailments, which the doctor admitted were serious if real, he caused plaintiff to go back to work on his engine cab twelve days after the accident happened, although plaintiff had told him he was unable to do the work and the doctor believed that plaintiff was suffering from serious hallucinations. Part of plaintiff's duties required him to act as a lookout, and he was seeing double. Dr. Bloomfield conceded that headaches and dizziness are symptoms of a brain concussion, but he insisted he was unable to find any evidence of a brain concussion, and that plaintiff was not suffering from such a concussion at any time during the entire period that he treated him. He ignored plaintiff's statements to him

as to his ailments upon the assumption that plaintiff was suffering from hallucinations. He seems to have disregarded entirely the manner in which the injury was sustained. The evidence shows that the tremendous force of the impact drove back some distance the engine upon which plaintiff was riding, and the eight cars attached to it. The following shows how far the doctor would go in his desire to help defendant:

Plaintiff testified that the wound he received in the accident was about one and a half inches behind the right ear; that he could not see the wound except in a looking-glass; that there was no mark on his cheek in front of his ear, and he was able to shave his face. Jack Sullivan, plaintiff's son, testified that he saw his father on April 7, 1944, after he was injured; that he was then in bed at home and had a bandage behind his right ear; that he wore that bandage quite a while; that there was no mark on his face between his ear and his eye. Anton J. Doupnik, a car inspector for defendant, testified that he "heard the cars bump together and they met head on with a pretty loud collision"; that he, a little later, saw plaintiff in the shanty; that plaintiff had a handkerchief on his head "right behind the right ear"; that he saw blood behind the right ear. The following then occurred: "Q. Was there any cut or mark on his face between the ear and the eye on the right side? A. I didn't see anything on his face, as far as I know." It is significant that the nurse who worked in defendant's hospital and who washed the wound and bandaged it was not called as a witness by defendant.

The evidence conclusively shows that the wound that plaintiff received was located one and a half inches behind the right ear and at a point where a very severe blow would be likely to cause concussion of the brain. Dr. Bloomfield realized that fact, apparently, and he testified that he found only "a deep abrasion

of the skin," about a quarter of an inch long, located about one and a half inches in back of the eye, and that plaintiff had no injury behind his right ear. When it is remembered that the tremendous impact caused the steel side of the cab window frame to hit plaintiff, the testimony of Dr. Bloomfield that the only injury plaintiff received was "a sort of deep abrasion of the skin" is highly improbable, to say the least. Dr. Bloomfield also testified that he had defendant's X-ray technician take X-ray pictures of plaintiff's skull, and after examining the X-ray pictures upon the stand he testified that he found no pathology in the skull except the loss of some teeth, and that he was able to determine from the X-ray pictures that plaintiff had no skull fracture. Upon cross-examination he admitted that X-ray pictures do not show a brain concussion as a rule, and that they do not help one in determining whether plaintiff had a concussion of the brain. He admitted that headaches and dizziness are sometimes symptoms of a brain concussion. These X-ray pictures were taken on June 9, 1944, at defendant's hospital. Plaintiff testified that before he went back to work he told Dr. Bloomfield that he thought he ought to be X-rayed and that the doctor told him it was not necessary; that the doctor did not seem to take any interest in him; that in May, 1944, he saw Gnadinger and told him he thought that he ought to have better medical care and that he was going to get another doctor, and that Gnadinger told him, "We will take care of you," and sent him back to Dr. Bloomfield. We are satisfied, after a careful consideration of the record, that Dr. Bloomfield was strongly biased in favor of defendant; that his treatment of plaintiff was of the most superficial kind, and that in his entire "treatment" of plaintiff he seems to have thought that his sole duty was to look after defendant's interests. It is clear that the trial court did not believe certain important

parts of the testimony of Dr. Bloomfield; nor do we. Dr. Bloomfield testified that the only mark that he found on plaintiff was in front of plaintiff's ear. If the blow were in the place indicated by plaintiff's testimony it would be more likely to cause a brain concussion than if it were in the position testified to by Dr. Bloomfield.

It would unduly extend this already lengthy opinion to state in detail the medical testimony that was given in the case. Plaintiff consulted Dr. T. S. F. Johnson professionally on June 2, 1944. Dr. Johnson testified that he then found plaintiff to be suffering from muscular incoordination, muscular weakness, impairment of vision and poor equilibration; that plaintiff gave him a history of the accident and told him that he was suffering from severe headaches, dizziness, nausea and general weakness; that it was his impression at the time of that examination that plaintiff was suffering from cerebral concussion, and he sent plaintiff to the hospital. In January, 1945, the doctor again examined plaintiff at the hospital, found the same symptoms, and that they were getting worse; that he was still treating plaintiff at the time of the trial and that it was his opinion that he was now about twenty per cent worse than when he first saw him in June, 1944; that he diagnosed plaintiff's condition as intracranial injury and that he based the diagnosis on the clinical findings and objective symptoms. Dr. Horace E. Turner also testified for plaintiff. Defendant stipulated that the doctor was qualified as an orthopedic surgeon. Dr. Turner testified that in his examination of plaintiff he found no evidence of psychoneurosis, and in answer to a hypothetical question that included plaintiff's theory of fact the doctor stated that he had an opinion, based upon a reasonable degree of medical certainty, that there might or could be a causal

connection between the accident described and plaintiff's ill-being. Dr. Robert W. Lennon, who testified for defendant, stated that he made an examination of plaintiff at the request of defendant or Dr. Bloomfield on June 20, 1944; that he specializes in eye, ear, nose and throat troubles; that he examined the ears, nose and throat of plaintiff and found some loss of hearing, chronic catarrhal otitis media and symptoms of dizziness and vertigo, and that in his opinion the dizziness and vertigo were caused by a middle ear infection. Upon cross-examination the doctor stated that injury to the brain might cause vertigo and dizziness. In connection with the testimony of Dr. Lennon it will be noted that Dr. Bloomfield testified that the vertigo and dizziness plaintiff claimed he had were mere hallucinations. Dr. Loyal Davis, a witness for defendant, testified that he examined plaintiff physically and neurologically on July 29, 1944, at the request of Dr. Bloomfield, and that he found no evidence that indicated the presence of any brain concussion; that he reached a diagnosis that plaintiff was suffering from an anxiety neurosis at the time of the examination; that he found plaintiff concerned about his condition because he felt that he had a serious brain injury. Upon cross-examination the doctor stated that dizziness and headaches may follow a cerebral concussion; that it was his opinion that in every case of brain concussion you would find unconsciousness to some degree.

Defendant states in its brief that if the evidence is clear and convincing that plaintiff in fact had a severe brain injury at the time of the signing of the release and that plaintiff and defendant were unaware at that time that he had such injury, that then he is entitled to have the release set aside, but defendant contends that "plaintiff has failed to prove by clear and convincing evidence that he received a brain injury."

This case was tried by an able and conscientious judge and we are satisfied that he would have been justified in finding that the blow plaintiff received in the accident caused a serious brain injury and that as a direct result of the said injury he suffered headaches, dizziness, nausea, weakness, inability to work, and mental disturbances, and that he did not know at the time he executed the release that he had suffered such serious brain injury. We are further satisfied that the court was justified in finding that the release could be set aside without injury to defendant. It is a matter of no importance whether or not defendant was aware at the time of the signing of the release that plaintiff had suffered serious brain injury, as the mistake of fact need not be mutual. (See Fraser v. Glass, 311 Ill. App. 336, 344; Smuk v. Hryniewiecki, 369 Ill. 546; Munnis v. The Northern Hotel Co., 237 Ill. App. 50, 55; 21 C. J. pp. 87, 88.)

Defendant, in its brief, raises several technical points, but upon the oral argument counsel for defendant stated it preferred to have the appeal decided upon the merits. After a careful consideration of the record we are satisfied that the decretal order of the Superior court of Cook county should be affirmed.

In conclusion we feel impelled to say that the effort of defendant to sustain the release in the face of certain uncontradicted evidence in this case does not appeal to our sense of justice.

The decretal order of the Superior court of Cook county is affirmed.

DECRETAL ORDER AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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ROBERT JOHNSON, LOUIS BEEBE, CHARLES
CHRISTIAN, WILL COLLINS, FRED DAVIS,
HUBBARD HOOD, JAMES J. LAWSON, LESTER
LOYD, ROBERT MCGHEE, GEORGE PLATER,
CHARLES RICHARDS, DORIS TAYLOR, JOHN
TRIGG, HOMER BARNES, WOODROW WILSON,
VINCENT LAWS, CLIFFORD HUNT, WILLIE
LANG, SHELBY TOOMBS, THEODORE BURNEY,
PATRICK JONES, FRANK WHITE, JR.,
HUEY WRIGHT, RUFUS MCBROWN and
HERMAN GIPSON,

Appellants,

v.

EDWARD J. KELLY, Mayor of the City of
Chicago; BARNET HODES, Corporation
Counsel of the City of Chicago;
WILLIAM BARTH, Assistant Corporation
Counsel of the City of Chicago; LUD-
WIG D. SCHREIBER, City Clerk of the
City of Chicago; JAMES P. ALLMAN,
Commissioner of Police of the City
of Chicago; EDWARD J. GORMAN, Public
Vehicle License Commissioner of the
City of Chicago; CHICAGO PARK DISTRICT,
a Body Politic and Corporate, ROBERT
J. DUNHAM, JACOB M. ARVEY, STEPHEN I.
WITMANSKI, JACOB H. GATELY and WILLIAM
L. McFETRIDGE, as Commissioners of the
CHICAGO PARK DISTRICT, and ROGER SHAN-
AHAN, as Chief of Police of the CHICAGO
PARK DISTRICT,

Appellees.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

331-13-13

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs (appellants) filed a verified complaint for injunction, mandamus and other relief in which they set up that all of the plaintiffs are honorably discharged veterans of World War II and members of an unincorporated association known as the Illinois Cab Drivers Association for Discharged Veterans; that they have been trained as taxicab drivers and motor vehicle operators and are engaged in the business of operating taxicabs for hire in Chicago and suburbs; that some of them are owners of said taxicabs so operating and others "are taxicab drivers for the owner plaintiffs herein mentioned"; that all members of said Association are duly licensed chauffeurs and motor vehicle oper-

The first of these is the fact that the
company has been operating for a number of years
and has a good reputation in the industry.
The second is that the company has a large
and experienced staff of employees.
The third is that the company has a good
relationship with its customers.

The fourth is that the company has a good
financial position and is able to meet its
obligations. The fifth is that the company
has a good track record of profitability.
The sixth is that the company has a good
relationship with its suppliers. The seventh
is that the company has a good reputation
in the community. The eighth is that the
company has a good track record of innovation.
The ninth is that the company has a good
track record of customer service. The tenth
is that the company has a good track record
of employee satisfaction.

The company has a good track record of innovation.

The company has a good track record of customer service.

The company has a good track record of employee satisfaction.

The company has a good track record of profitability.

The company has a good track record of innovation.

The company has a good track record of customer service.

The company has a good track record of employee satisfaction.

The company has a good track record of profitability.

The company has a good track record of innovation.

The company has a good track record of customer service.

The company has a good track record of employee satisfaction.

ators in the City of Chicago; that they have complied with all State laws and City ordinances relating to the operation of taxicabs except the ordinance known as 28-6 of the City of Chicago; that repeated arrests have been made of plaintiffs since October 4, 1945, by police officers of said City under the directions of defendant James P. Allman, Commissioner of Police of said City, and Roger Shanahan, Chief of Police of the Chicago Park District; that approximately 700 arrests have been made of the owner plaintiffs, the driver plaintiffs, and other members of the said Association, who are operating the taxicabs of the owner plaintiffs, by police officers of said City of Chicago and police officers of said Park District; that the arrests by said City charge plaintiffs with violations of ordinance 28-6 of the Ordinances of said City, and the arrests made by said Park District charge violations of an ordinance of said Park District known as 18-A-2. The complaint alleges that the ordinance known as 28-6 of said City and the ordinance known as 18-A-2 of said Park District are null and void, and the complaint prays that a temporary injunction issue, without bond, enjoining defendants from prosecuting any of the parties already arrested and from arresting or causing the arrest of any of the said licensed chauffeurs, drivers, servants and agents, for violations of the said sections of said ordinances until the further order of the court, and that upon a final hearing said temporary injunction may be made permanent.

Defendants answered plaintiffs' complaint, and also filed a "Counterclaim for Injunction" against plaintiffs and certain other parties, mentioned in the injunction order hereinafter set out. The counterclaim alleges that the City of Chicago is a municipal corporation organized and existing under and by virtue of the Revised Cities and Villages Act of the State of

Illinois; that the Chicago Park District is a municipal corporation organized and existing under an Act in relation to the creation, maintenance, operation and improvement of the Chicago Park District, approved July 10, 1933; that on August 30, 1939, the City Council of said City passed an ordinance known as the Municipal Code of Chicago, which ordinance, together with amendments made from time to time thereto, has been in full force and effect since August 30, 1939; that the court is requested to take judicial notice of said Code and in particular Chapter 28 thereof, comprising sections 28-1 to 28-50, inclusive, relating to public vehicles, which chapter is hereby incorporated by reference in this counterclaim with the same force and effect as though it were set out in haec verba; that on May 18, 1934, the City Council of said City passed an ordinance which appears on pages 2271 to 2273 of the Journal of Proceedings of the City Council of that date; that a true and complete copy of said ordinance has been attached to the answer to the complaint herein as Exhibit "A" and is hereby incorporated by reference as Exhibit "A" of this counterclaim; that said ordinance was accepted by numerous persons, firms and corporations within sixty days after the passage thereof and by reason thereof became effective from and after May 18, 1934, and has been in full force and effect ever since; that on December 22, 1937, the City Council of said City passed an ordinance which appears on page 5027 of the Journal of Proceedings of the City Council of that date; that a true and complete copy of said ordinance has been attached as Exhibit "B" of the answer to the complaint herein and by reference is incorporated as Exhibit "B" in this counterclaim; that within thirty days after the passage of said ordinance one or more licensees under the ordinance of May 18, 1934, filed with the city clerk formal written acceptance of said ordinance of December 22, 1937, and surrendered at least

616 taxicab licenses; that by reason of said acceptance of said ordinance of December 22, 1937, said ordinance became effective and has been in force and effect ever since; that said ordinances of May 18, 1934, and December 22, 1937, were passed by the City Council of said City pursuant to powers duly delegated to it by the laws of the State of Illinois to the end that undue congestion upon the streets of the City will be avoided and the ordinary and necessary travel of vehicles and pedestrians and the safety of persons and property lawfully upon the streets of the City will be safeguarded; that the public convenience and necessity required the passage of said ordinances of May 18, 1934, and December 22, 1937; that prior to October 1, 1945, each of the owner plaintiffs named in the complaint made application for a public passenger vehicle license to the Public Vehicle License Commissioner of the City of Chicago; that said applications were refused for the reason that public convenience and necessity did not require the taxicab service offered by the applicants for licenses and none of said applications was based upon a transfer to permit replacement of a taxicab or in the annual renewal of any license or upon assignment of any such license or upon assignment of the right to apply for such license or upon revocation for cause of termination in any other manner of any license issued pursuant to the ordinances of May 18, 1934, and December 22, 1937; that notwithstanding the inability and failure of said owner plaintiffs to obtain a license for their taxicabs from the Public Vehicle License Commissioner of said City and without having obtained public vehicle licenses as provided by Chapter 28 of the Municipal Code of Chicago said owner plaintiffs and driver plaintiffs and said other parties began to operate for hire upon the streets of said City and the boulevards and driveways of said Park District and caused to be driven for hire upon the streets of said City and the boulevards and driveways of said Park District by

the driver plaintiffs named in the complaint the motor vehicles described in the applications for licenses and in the complaint; that beginning with October 4, "1934," said City and said Park District, through their police officers, have caused arrests to be made of said owner plaintiffs and driver plaintiffs of said taxicabs or public vehicles so operated upon the streets of said City and the boulevards and driveways of said Park District without public vehicle licenses; that despite such arrests, immediately after the release of said owner plaintiffs or driver plaintiffs from custody upon bail bonds and pending the trial of their cases, the said plaintiffs and additional respondents to this counterclaim resumed the operation and driving of said taxicabs or public vehicles upon the streets of the City of Chicago and the boulevards and driveways of the Chicago Park District for hire, and have threatened to continue such operation in violation of the ordinances of said City and said Park District and in utter defiance of the requirements of said municipalities for the health, safety and convenience of the inhabitants of said City; that the free and unregulated use of the streets of said City and the boulevards and driveways of said Park District for the operation of taxicabs as public passenger vehicles for hire and the cruising, parking or stopping of such vehicles for solicitation of business incident to the operation thereof for private gain will cause undue congestion upon the streets of said City and the boulevards and driveways of said Park District and interfere with the ordinary and necessary travel of other vehicles and pedestrians and is a menace to the safety of persons and property lawfully upon the streets of said City and the boulevards and driveways of said Park District; that the operation of the automobiles or motor vehicles of plaintiffs as public passenger vehicles for hire upon the streets of said City and the boulevards and driveways of said Park District without public vehicle licenses as required by the

the survey of the city in 1900. In the year 1900, the city of New York was divided into five districts, each of which was further divided into smaller sections. The first district, which was the largest, was the Manhattan district. It was divided into five sections, each of which was further divided into smaller sections. The second district was the Bronx district. It was divided into three sections, each of which was further divided into smaller sections. The third district was the Richmond district. It was divided into two sections, each of which was further divided into smaller sections. The fourth district was the Queens district. It was divided into two sections, each of which was further divided into smaller sections. The fifth district was the Kings district. It was divided into two sections, each of which was further divided into smaller sections. The city of New York was divided into five districts, each of which was further divided into smaller sections. The first district, which was the largest, was the Manhattan district. It was divided into five sections, each of which was further divided into smaller sections. The second district was the Bronx district. It was divided into three sections, each of which was further divided into smaller sections. The third district was the Richmond district. It was divided into two sections, each of which was further divided into smaller sections. The fourth district was the Queens district. It was divided into two sections, each of which was further divided into smaller sections. The fifth district was the Kings district. It was divided into two sections, each of which was further divided into smaller sections.

ordinances of said City and said Park District, is an undue burden upon the city streets and the boulevards and driveways of the Park District and is a nuisance; that, nevertheless, the said owner and driver plaintiffs named in the complaint, the said additional respondents to this counterclaim, and other members of said Association combining and confederating together and with divers persons at present unknown to the counterclaimants, whose names, when discovered, the counterclaimants pray they may be at liberty to insert herein with apt words to charge them as parties respondent to this counterclaim and contriving to wrong and injure the counterclaimants in the premises have refused and do now refuse to comply with the ordinances of the City of Chicago and the request of the Public Vehicle License Commissioner of the City of Chicago to refrain and desist from operating and driving their said vehicles as taxicabs or public passenger vehicles for hire upon the streets of said City and the boulevards and driveways of said Park District unless and until proper licenses shall have been issued therefor, all of which action of the plaintiffs is contrary to equity and good conscience. Wherefore, counterclaimants pray that the operation and driving of motor vehicles by the plaintiffs and said additional respondents to this counterclaim or any of them as public passenger vehicles for hire upon the streets of the City of Chicago and the boulevards and driveways of the Chicago Park District without public vehicle licenses may be declared by the court to be a nuisance, and that said plaintiffs and additional respondents and each of them, their agents, servants and employees, and the members of the Illinois Cab Drivers Association for Discharged Veterans and the agents, servants and employees of said Association, be enjoined and restrained during the pendency of this suit from operating taxicabs as public passenger vehicles for hire upon the streets of

the City of Chicago and the boulevards and driveways of the Chicago Park District without public vehicle licenses; and that after a full hearing upon the merits of this cause said injunction shall be made permanent and that counterclaimants may have such other and further relief in the premises as equity may require and to the court shall seem meet.

On November 21, 1945, the court entered the following order:

"It Is Hereby Ordered, Adjudged and Decreed that a writ of injunction issue in the above entitled cause as prayed in said counterclaim restraining the plaintiffs and respondents to the counterclaim Robert Johnson, Louis Beebe, Charles Christian, Will Collins, Fred Davis, Hubbard Hood, James J. Lawson, Lester Loyd, Robert McGhee, George Plater, Charles Richards, Doris Taylor, John Trigg, Homer Barnes, Woodrow Wilson, Vincent Laws, Clifford Hunt, Willie Lang, Shelby Toombs, Theodore Burney, Patrick Jones, Frank White, Jr., Huey Wright, Rufus McBrown, Herman Gipson, Henry Williams, Ocer Smith, William Greer, Silmon Reed, Aljay Williams, Wardell Scott, R. P. Cash, William Forrest, Albert Miller, Curtis Hartfield, O'Dell Guy, Douglas Fitzhugh, Milton Anderson, Zetora Boykins, Walter Mabry, Earl Foster, William Jones, Willie Davis, Albert Sanders, Willie Ray, Fred Cunningham, Sam Anderson, Norris Thomas, Cory Reed, Ben McCorkle, and the agents, from operating taxicabs as public passenger vehicles for hire upon the streets of the City of Chicago and the boulevards and driveways of the Chicago Park District without public vehicle licenses until the further order of this court. * * *" (Italics ours.)

Plaintiffs appeal from this interlocutory order.

Plaintiffs contend that "the portions or parts of the Ordinance of the City of Chicago known as 28-6 [Ordinances of

1945] which provide that it shall be unlawful for the owner of the public passenger vehicle to operate the same or permit the same to be operated or for any person to drive any public passenger vehicle on the public ways of the City unless such public passenger vehicle is licensed as hereinafter provided, is void, unreasonable, ultra vires and unconstitutional"; that "the portions or parts of the Ordinance of the City of Chicago known as Chapter 195-A, Section 195-A-1 to 195-A-13 and Chapter 196-A, Section 196-A-1 to 196-A-6 of the Municipal Code of Chicago [Ordinances of May, 1934], governing the operation of taxicabs within Chicago, appointment of Public Vehicle License Commissioner, fixing the rate of fare for taxicabs, providing for decrease in the number of taxicabs to 3000, extending the Franchise period to December 31, 1945 and making taxicab licenses assignable, are void, unreasonable, ultra vires and unconstitutional."

During the oral argument upon this appeal it was agreed by the counsel that the Supreme court in the case of Yellow Cab Co. v. City of Chicago then pending in that court would probably pass upon the validity of the City of Chicago ordinances in question. The Supreme court has since filed an opinion in the Yellow Cab Co. case (396 Ill. 388), in which it held that the City ordinances that the counterclaimants invoked in their counterclaim in support of their prayer for a temporary injunction, and which plaintiffs here complain are invalid, are valid. Plaintiffs also contend that the portions or parts of the ordinance of the Chicago Park District known as 18-A-2, which prohibits the operation of public passenger vehicles in the park system without the vehicle having been licensed as such by the City of Chicago are unreasonable, unconstitutional and void. The Supreme court, in the Yellow Cab Co. case, was not called upon to pass upon the validity of that ordinance. In Chicago

Park District v. Lattipée, 364 Ill. 182, it appears that Wilbur Lattipée was convicted in the Municipal Court of Chicago for violating section 7b of chapter 10 of an ordinance of the Chicago Park District, which provides that no person shall solicit passengers for hire in the park system. Upon appeal it was contended that the Chicago Park District was without power to enact that ordinance. The Supreme court said (pp. 184, 185):

"Section 7 of the act creating the Chicago Park District (Ill. State Bar Stat. 1935, chap. 105, par. 574,) vested in its commissioners the power to establish by ordinance all needful rules and regulations for the government and protection of parks, boulevards and driveways, as well as the power to exclude all objectionable travel and traffic; to make and enforce reasonable traffic and other regulations, and to provide penalties for the violations of such rules and regulations. The vesting of power by the legislature in a municipality to regulate traffic so as to safeguard both life and property is everywhere recognized as being within the province of the legislature. The power here given to the Chicago Park District is no different from that granted to cities and villages within this State. Moreover, it is within the legislative domain to empower municipalities to preserve their boulevards and parkways as pleasure driveways. The annoyance and dangers incident to certain kinds of traffic are so well known that they involve the public welfare, and the State may empower municipalities to designate what type of motor vehicles may be operated over certain streets. In fact, vehicular traffic may be entirely suspended if the situation surrounding the thoroughfare warrants it. While, generally, a person has a right to the use of a street, that right may be circumscribed by reasonable regulations, and no one has an inherent right to use a street as a place of business where he may

operate a taxicab or a motor bus for hire. The presence of taxicabs in congested streets of large cities increases the possibility of accidents, and, consequently, of personal injuries. (Weksler v. Collins, 317 Ill. 132.) We held in People v. Thompson, 341 Ill. 166, that where one seeks a special or extraordinary use of the streets or public highways for his private gain, as by the operation of an omnibus, truck, motor bus or the like, the State may regulate such use of the vehicle thereon or may even prohibit it. The power to regulate and prohibit in such cases is beyond question, and that power was expressly conferred upon the park district as to its thoroughfares by the statute above referred to."

In Jackie Cab Co. v. Chicago Park Dist., 366 Ill. 474, it was held that the ordinance of the Park District which provides that "No additional passenger or passengers shall be permitted to or allowed to become passengers upon any public passenger vehicle after it has started upon any trip, except at the request and direction of the person or persons first hiring the vehicle" was a valid exercise of the power conferred by section 7 of the Act creating the Chicago Park District; that a taxicab is a common carrier which derives its income from the use of the public streets and park boulevards and subjects itself to the regulations imposed by the municipal ordinances. Plaintiffs argue that the ordinance in question (18-A-2) is invalid because it prohibits traffic in the Park District by public passenger vehicles which had not complied with the State Motor Vehicle Act or with the valid ordinances of the City of Chicago requiring a license. The ordinance in question is not an attempt by the Chicago Park District to exercise jurisdiction beyond the territorial limits of the District. The ordinance merely prohibits the operation of public passenger vehicles within the

territorial limits of the Chicago Park District unless they have licenses of the City of Chicago; and in this connection it must be noted that chapter 105, par. 333.1, sec. 1 (Ill. Rev. Stat. 1945), provides: "The Chicago Park District shall comprise all of the City of Chicago." We think that the ordinance in question not only comes within the police power of the Chicago Park District under the statute creating it, but it is a commendable ordinance. No good reason has been advanced by plaintiffs why the Chicago Park District, under the Act creating it, should not have the power to prohibit by ordinance traffic in the Park District by public passenger vehicles which have not complied with the State Motor Vehicle Act or with the valid ordinances of the City of Chicago requiring a license for such vehicles. We are satisfied that we would not be warranted in holding that the ordinance in question is invalid. While we have no right or power to pass upon plaintiffs' contention that the said ordinances of the City of Chicago and the said ordinance of the Chicago Park District are unconstitutional, we have seen fit, however, to treat the contention as a claim that the ordinances in question are invalid.

There is no merit in plaintiffs' argument that the trial court erred in denying them a right to introduce evidence on the hearing of the counterclaimants' motion for a temporary injunction. Plaintiffs' complaint proceeded upon the theory that the ordinances in question were invalid, and they sought an injunction to restrain repeated arrests of plaintiffs for violations of the allegedly invalid ordinances. In answer to defendants' counterclaim for an injunction plaintiffs adhered to the theory they advanced in the complaint and resisted the issuance of an injunction on the theory that the arrests were made upon invalid ordinances. It must be remembered that the counterclaim-

ants were merely asking for a temporary injunction and that plaintiffs admittedly were operating in violation of the municipal ordinances in question. For the purposes of the motion for a temporary injunction the trial court was certainly justified in treating the ordinances as valid. The trial court was also justified in concluding that confusion and chaos would be the inevitable result of a refusal to grant a temporary injunction. In City of Chicago v. Eagle Taxi Co., 273 Ill. App. 614 (Abst. Op.), we sustained the issuance of a temporary injunction that was based upon like circumstances.

We find no merit in the instant appeal and the temporary injunction order of the Superior court of Cook county entered November 21, 1945, is affirmed.

TEMPORARY INJUNCTION ORDER
ENTERED NOVEMBER 21, 1945,
AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

43819

CITY OF CHICAGO, a Municipal
Corporation,

Appellee,

v.

NATIONAL BRICK COMPANY, a
Corporation,

Appellant.

222A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A verified complaint in the name of the City of Chicago was filed in the Municipal Court of Chicago by Anton Fox, Smoke Inspector of the City of Chicago, on March 26, 1945, against National Brick Company, defendant. The complaint alleges that National Brick Company, on March 19, 1945, permitted its kilns to emit smoke and noxious gases for one hour following 2:30 P. M. and one hour following 4:30 P. M., thereby causing a nuisance to the residents who live in the neighborhood of the premises of defendant, in violation of Sections 99-4, 99-5, 99-38 and 99-72 of the Municipal Code of Chicago. On March 26, 1945, defendant entered a special and limited appearance "for the purpose of objecting to the jurisdiction of the Court." On March 26, 1945, the following order was entered:

"Now come the parties to this cause, and thereupon this cause comes on in regular course for trial before the Court without a jury and the Court having heard the evidence and the arguments of counsel, and being fully advised in the premises, enters the following finding, to-wit:

"The Court finds the defendant guilty of a violation of the ordinance described in the complaint herein and assesses a fine against said defendant in the sum of Two Hundred and 00/100 Dollars (\$200.00)."

"This cause coming on for further proceedings herein,

CITY OF CHICAGO, a Municipal Corporation,

Appellee,

NATIONAL BUREAU OF FIRE ALARMS, a Corporation,

Appellant.

MR. JUSTICE ROBERT H. JACKSON delivered the opinion of the Court.

A verified complaint in the nature of a writ of

habeas corpus was filed in the Municipal Court of Chicago by

Anton Nov, whose residence is at 1234 N. Dearborn, on

March 28, 1945, against National Bureau of Fire Alarms, Inc.,

The complaint alleges that National Bureau of Fire Alarms, Inc.,

in 1945, permitted its office to emit smoke and noxious

gases for one hour following 8:00 P. M. and one hour follo-

ing 4:00 P. M., thereby causing a nuisance to the residents

who live in the neighborhood of the office of National Bureau of

Fire Alarms, Inc., and that National Bureau of Fire Alarms, Inc.,

in violation of the ordinance of the City of Chicago, Chapter 4-10-1,

entered a special and illegal contract for the purpose of

objecting to the jurisdiction of the Court, and that National Bureau of

Fire Alarms, Inc., in violation of the ordinance of the City of Chicago,

Chapter 4-10-1, entered a special and illegal contract for the purpose of

objecting to the jurisdiction of the Court, and that National Bureau of

Fire Alarms, Inc., in violation of the ordinance of the City of Chicago,

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Fire Alarms, Inc., in violation of the ordinance of the City of Chicago,

Chapter 4-10-1, entered a special and illegal contract for the purpose of

objecting to the jurisdiction of the Court, and that National Bureau of

Fire Alarms, Inc., in violation of the ordinance of the City of Chicago,

it is considered by the Court that the plaintiff have judgment on the finding of the Court entered herein, and it is considered by the Court that the plaintiff have and recover of and from the defendant a fine in the sum of Two Hundred and 00/100 Dollars (\$200.00) and also the costs of this suit taxed at Ten Dollars (\$10.00) and that execution issue for the amount of said fine and costs. And it appearing to the Court that said fine accrued to the plaintiff in consequence of the violation by defendant of the ordinance of the plaintiff described in the complaint herein known as section 99-4, the Court finds that it has jurisdiction of the subject matter of this cause and of the parties hereto, and that said defendant has been duly and regularly convicted of the violation of said ordinance according to law, and that any person convicted of a violation of said ordinance, may, under the law, be imprisoned in the House of Correction of said city for non-payment of any fine imposed for such violation.

"This cause coming on for hearing upon the motion of the defendant heretofore entered herein that the judgment entered herein on the 26th day of March, 1945 be vacated and set aside, which motion the Court orders set for April 23rd, 1945."

On March 4, 1946, the motion of defendant that the judgment entered March 26, 1945, be vacated and set aside was overruled. Defendant appeals.

That defendant was guilty of the offense charged in the complaint is demonstrated by the evidence. Indeed, after the City had completed its proof the trial court offered defendant ample time to produce evidence to rebut the charge, but defendant concluded to offer no proof. Anton Fox, smoke inspector of the City of Chicago, testified that he visited defendant's premises on March 17, 1945, and spent an hour and a half in

and around the premises, during which time he observed smoke coming from the kilns of defendant; that the smoke was bluish white and was irritating to the membranes of his nose and caused him to cough. Upon cross-examination he testified that the office of defendant is located inside of the city limits but that the kilns are located outside of the city limits. On redirect examination he testified that samples of the brick of defendant had been obtained and had been analyzed in the previous months of October and November. Fred T. Mommsen, a smoke inspector of the City, testified that on March 19, 1945, he visited defendant's premises, spent an hour's time at the brick yard sheds, some time at the residence of Frank J. Schultz, 3131 Fargo avenue, and also visited a few other places, all located within a block or two of defendant's premises; that during all the time that he spent at defendant's premises and at the residence of Frank J. Schultz and the other places, he noticed a heavy vapor and a repulsive odor emitting from defendant's premises; that he had been a smoke inspector of the City for seven years and that his duties were to investigate complaints and to determine whether the type of smoke complained of constitutes a nuisance; that there were two types of smoke and gas coming out of defendant's kilns at the time, one a grayish white vapor that did not rise above the roof of the structure but came out of the vents and cracks of the roof; the second type of smoke was dark and rose higher than the white vapor; that the vapors and gases irritated his throat and compelled him to cough. Frank Schultz, whose home is located within 225 feet of defendant's premises, gave testimony that corroborated the testimony of Mommsen. Schultz also testified that he had to close the windows of his home in order to prevent irritation

and sneezing. J. P. Wehrheim, vice president of defendant company, testified that the kilns of defendant are located 100 feet outside of the city limits of the City of Chicago. Anton Fox, recalled, testified that when he inspected the premises of defendant he obtained burnt and unburnt brick from the kilns of defendant with the consent of J. P. Wehrheim. Matthew J. Martinek, chemist for the City of Chicago, testified that he made an analysis of the burnt and unburnt brick delivered to him by Anton Fox; that during the process of manufacturing brick sulphur dioxide gas is given off and that that gas has an irritating effect, and in large concentrates it might be fatal. Marguerite Goldsmith, who resides about a block and a half from defendant's premises, testified that on March 19, 1945, she observed smoke coming from defendant's premises and that the smoke irritated her throat and made her cough, and that she was compelled to keep the windows of her home closed. Similar testimony was given by Irving Naxon, who resides at 3003 Jarvis avenue. Defendant stipulated that a number of persons present in the courtroom would give testimony similar to that given by witnesses Schultz and Goldsmith. At the conclusion of the hearing counsel for defendant stated to the court that defendant was making bricks for the United States government to be used for war purposes, and that it would take defendant two or three days more to finish the immediate needs of the government, and he thought that a temporary inconvenience of two or three days would do no harm. It appears from a colloquy between counsel and the court that defendant, in a prior hearing before Judge Borrelli, obtained a continuation of the cause in order to enable it to get the necessary devices to abate the nuisance, so that it could operate its business without inconveniencing the neighbors, and that defendant after

and another, J. T. ... who was president of defendant company, testified that the King of ... 100 feet outside of the city limits of ... Anton ... testified that when he inspected the premises of ... from the King of ... Matthew ... testified that he made an analysis of ... one to him by Anton ... during which ... was an ... might be ... blood ... on March 1, 1964, the ... promises and that the ... court, and that ... home ... number of persons ... similar to that given ... the conviction of the ... the court that ... government to be ... defendant two or three ... of the government, and ... of two or three days ... colloquy between counsel and the ... prior hearing before Judge ... of the cause in order to enable it to get the necessary devices to state the nuisance, so that it could operate its business without inconveniencing the neighbors, and that defendant after

obtaining the continuance did discontinue the use of its business for several months, but that it then started operating again. Mr. Weber, an officer of defendant, stated to the court that defendant had placed an order with Johns-Manville for necessary smoke devices and that that company had told them that it would take three or four months more before it could supply the devices. The attorney for the City stated that what the City was after was an abatement of the nuisance and not a collection of fines, and that it would agree to have the court allow a motion to vacate the judgment to be filed in order to give defendant an opportunity to abate the nuisance, but that if defendant started the kilns again the City would insist upon the payment of the fine and that it would bring suit every day that the kilns are used, and the counsel for the City asked the counsel for defendant if they were satisfied with that arrangement, to which the counsel for defendant answered, "Yes." It was then agreed that the motion to vacate be passed until September, and the record shows that the motion to vacate the judgment was not overruled until March 4, 1946.

Defendant contends that no warrant was served upon it and that the arrest slip served on Bernard F. Weber conferred no jurisdiction over Mr. Weber or defendant company; that if the court acquired jurisdiction of the subject matter it was not until the complaint was filed and sworn to. It is sufficient to say, in answer to this contention, that defendant took an active part in the trial of the cause, made a motion for a continuance, a motion for a jury trial, and a motion for a change of venue; that it cross-examined the witnesses called by the City and entered into a stipulation that certain persons, if called, would give certain evidence. Defendant having submitted to the jurisdiction of the Municipal Court will not be

allowed to now urge that the process was defective.

Defendant next contends that the Municipal Court is a court of limited jurisdiction and its jurisdiction is confined to causes of action which arise within the limits of the City of Chicago. The evidence shows that the brick kilns of defendant are located just outside of the city limits and that its office is situated within the city limits. Paragraph 8-1 of the Cities and Villages Act (chap. 24, Ill. Rev. Stat. 1945), under the heading "Territorial Jurisdiction," provides: "The corporate authorities in all municipalities have jurisdiction in and over all places within one-half mile of the corporate limits for the purpose of enforcing health and quarantine ordinances and regulations." Paragraph 23-89 of the Cities and Villages Act (chap. 24, Ill. Rev. Stat. 1945), under the heading "General Powers of the Corporate Authorities," in enumerating the express powers conferred upon municipalities, provides: "To prohibit any offensive or unwholesome business or establishment within the municipality and within the distance of one mile beyond the municipal limits." There is no merit in the instant contention of defendant.

The record shows conclusively that defendant was guilty of the offense charged and that the City has been very considerate in its treatment of defendant. The City did not ask that the motion to vacate be denied until nearly a year after the entry of the judgment. Defendant has not seen fit to incorporate in the record a transcript of what happened at the time the motion to vacate was denied, but it is a reasonable inference from what occurred at the time of the entry of judgment that it appeared to the City and the trial court that defendant had not kept its promise to abate the nuisance.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

allowed to say that the process was defective.

Defendant next contended that the Municipal Court is a

court of limited jurisdiction and its jurisdiction is confined

to causes of action which arise within the limits of the City

of Chicago. The evidence shows that the facts arose in De-

fectant was located just outside of the city limits and that

the office is situated within the city limits. Paragraph 1-1

of the Ordinance and Village Act (Comp. St. Ill. Ann. Stat. 1945)

under the heading "Territorial Jurisdiction" provides: "The

corporate authorities in all municipal districts have jurisdiction

in and over all places within one-half mile of the corporate

limits for the purpose of enforcing health and sanitation

ordinances and regulations." Paragraph 1-2 of the Ordinance

and Village Act (Comp. St. Ill. Ann. Stat. 1945) reads: "The

heading "General Powers of the Corporate Authorities" in

enumerating the express powers conferred upon municipalities,

provides: "to prohibit any offensive or unwholesome business

or establishment within the municipal limits and within the dis-

trict of one mile beyond the municipal limits." There is no

mention in the instant contention of defendant.

The record shows conclusively that defendant was guilty

of the offense charged and that the City has been very consid-

erate in its treatment of defendant. The City did not ask that

the motion to vacate be denied until further notice after the

entry of the judgment. Defendant has not seen fit to intro-

duce in the record a transcript of what happened at the time

the motion to vacate was denied, but it is a reasonable infer-

ence from what occurred at the time of the entry of judgment

that it appeared to the City and the trial court that defendant

had not kept its promise to state the nuisance.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

43887

SADIE M. FARMER,

Appellant,

v.

SAMUEL E. FULLER,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages to plaintiff's automobile resulting from a collision with defendant's automobile at a street intersection. Defendant filed a counterclaim. Upon a hearing before a justice of the peace, judgment was entered in favor of plaintiff and against defendant for \$488.13, plaintiff was found not guilty on the counterclaim of defendant and judgment was entered in her favor. On appeal from the justice of the peace the cause was tried de novo in the Superior Court without a jury. There the trial court found in favor of defendant on plaintiff's complaint and in plaintiff's favor on the counterclaim of defendant and judgments were entered accordingly. Plaintiff appeals.

The record discloses that the accident occurred at 1:00 p.m. on April 14, 1944, at the intersection of Artesian Avenue and Grove street, both brick-paved highways in the city of Blue Island, Illinois. Grove Street, which runs east and west, is thirty-six feet wide, and Artesian Avenue is twenty-eight feet wide. On the day of the occurrence the pavement was dry and the visibility clear.

Herman Wilkes, called in behalf of the plaintiff, testified that he was general manager of the Modern Drop Forge Company, which is owned by the plaintiff. On the day of the accident he was driving the plaintiff's Cadillac automobile south on Artesian Avenue at the rate of fifteen miles an hour. When he reached a point ten feet north of Grove Avenue he saw defendant's car about 100 feet west of Artesian Avenue going east at the rate of twenty-five miles

This is an exhibit in the case of the State vs. [redacted]

Mobile recording from a cellular phone conversation

re: a series of conversations between [redacted] and [redacted]

beginning before a hearing of the [redacted] court in [redacted]

view of plaintiff as against defendant for a [redacted]

found the guilty on the [redacted] of [redacted] and [redacted]

was entered in the [redacted] court in [redacted] and [redacted]

the cause was tried in the [redacted] court in [redacted] and [redacted]

there the trial court found in favor of the [redacted] and [redacted]

complaint and in plaintiff's favor on the [redacted] of [redacted]

and judgment was entered accordingly. Plaintiff appeals.

The record reflects that the [redacted] of [redacted] and [redacted]

on April 14, 1944, at the intersection of [redacted] and [redacted]

grove street, [redacted] [redacted] [redacted] in the [redacted] of [redacted]

Illinois. Grove street, [redacted] [redacted] [redacted] [redacted] [redacted]

feet wide, and [redacted] [redacted] [redacted] [redacted] [redacted]

day of the occurrence the pavement on [redacted] [redacted] [redacted]

Herbert [redacted], called in [redacted] of the [redacted] [redacted]

that he was general manager of the [redacted] for [redacted] [redacted]

which is owned by the [redacted]. On the day of the accident he was

driving the plaintiff's [redacted] [redacted] [redacted] on [redacted] [redacted]

at the rate of fifteen miles an hour. When he reached a point ten

feet north of Grove Avenue he saw defendant's car about 100 feet

west of [redacted] Avenue [redacted] [redacted] [redacted] [redacted] [redacted]

an hour. As the front wheels of plaintiff's automobile were even with the south curb of Grove Street defendant's automobile, a 1936 Plymouth, struck the right side near the rear of plaintiff's car, causing it to turn facing west at the south curb. After the impact defendant's car proceeded in an easterly direction across Artesian Avenue and beyond the east curb where it struck and was stopped by a fire plug located eight feet east of the east curb. The witness characterized the intersection as "a kind of a semi-business district."

Plaintiff testifying in her own behalf gave substantially the same version of the accident as that of Wilkes. She further testified that in talking to defendant after the accident "he said he did not see us."

Defendant Fuller testified that he was a maintenance man for Blue Island Community High School; that he was driving alone on the day of the occurrence; that after entering Grove Street two blocks west of Artesian Avenue he proceeded in an easterly direction at the rate of fifteen miles an hour; that there was a two-story frame building on the northwest corner of the intersection set back about five feet from the building line; that on the day of the occurrence cars were parked there, and "trees are very massive on both sides of the street"; that as he neared the intersection he saw no moving traffic on the street; "I looked to the left, then to the right * * * so I cast my eye back to the left. This car (Cadillac) was so close I could not possibly prevent the collision."

Defendant further testified that just before the occurrence he was driving about seven feet from the south curb, and that after the impact he struck the fire plug located eight feet east of the east curb on Grove Street, knocking it "out of plumb about

an hour. As the front wheels of plaintiff's car rolled over with the south curb it drove toward defendant's car. Plaintiff, struck the right side of the car of defendant's car, causing it to turn facing east of the south curb. After the impact defendant's car proceeded in an easterly direction toward Arden Avenue and beyond the east curb where it struck and stopped by a fire hydrant which stood east of the east curb. The witness characterized the intersection as being a "right-of-way intersection."

Plaintiff testified in his own behalf that approximately the same location of the accident as that of the defendant testified that in coming to a stop at the intersection he did not see it.

Defendant, after testifying that he was driving north for his third turning right onto Arden Avenue, testified on the day of the occurrence; this after entering the intersection of Arden Avenue and the intersection of the two blocks west of the intersection. He testified that he was driving at the rate of fifteen miles an hour, that there was a two-story frame building on the northeast corner of the intersection and back about five feet from the building line; that on the day of the occurrence cars were parked there, and that he was driving on both sides of the street; that as he passed the intersection he saw no moving traffic on the street; that he then turned left, then to the right, so I could see him back on the left. This car (defendant's) was so close I could not possibly observe a collision."

Defendant further testified that just before the occurrence he was driving about seven feet from the south curb, and that after the impact he struck the fire plug located eight feet east of the east curb on Grove Street, knocking it "out of place" about

one inch." On cross-examination defendant testified, "I was probably fifteen feet from the west curb of Artesian when I looked to the left (north). I could not see clear around the corner because it was so crowded there * * * the street is so narrow"; that at the intersection he slowed down to ten or twelve miles an hour and could stop in four or five feet; and that at the time of impact plaintiff's automobile was south of the center line of Grove Street. Plaintiff's counsel asked the following question, "When was the first time that you saw Mrs. Farmer's Cadillac car?" to which plaintiff replied, "After I looked to my left and then to my right I cast my eyes back to the left again for a second to look and the car was right so close it was impossible to avoid it."

No appearance or brief has been filed in this court by the appellee. Plaintiff's principal contention is that the court's finding on the complaint in favor of the defendant is against the manifest weight of the evidence. It appears from plaintiff's brief that defendant relied on Section 68 of the Motor Vehicle Act, which, he asserted, gave him the right of way. In Serletic v. Jeromell, 324 Ill. App. 233, this court, in construing the right-of-way rule, held that the statute affords no absolute right of way but that the element of speed and the relative position of the parties with respect to the intersection must be given consideration.

According to defendant's testimony, his failure to observe plaintiff's car as it approached the intersection was due to massive trees and parked automobiles, but his failure to see plaintiff's car after it entered the intersection is unexplained. Although he asserted he could stop his car in four or five feet while proceeding at ten or twelve miles an hour, yet his automobile, after the impact, ran 32 feet across Grove Street to the water plug eight feet beyond the east curb. Considering the retarding effect of the impact upon the movement of defendant's automobile and the

distance it traveled thereafter, and that it still had sufficient force to displace the water plug by at least one inch, it seems incredible that the defendant's car was proceeding at only ten or twelve miles an hour immediately before the collision occurred.

On the other hand, the testimony as to the speed of plaintiff's automobile when it entered the intersection, and the relative position of the cars with respect to the intersection at that time is uncontroverted.

Under these facts and circumstances, we are impelled to hold that the court's finding with respect to the complaint is clearly against the manifest weight of the evidence.

We have not considered the trial court's finding and judgment with respect to defendant's counterclaim since no cross errors were assigned or urged.

For the reasons given, that part of the judgment which is in favor of the defendant and against the plaintiff on her complaint is reversed and the cause remanded for a new trial.

REVERSED IN PART AND
REMANDED FOR NEW TRIAL.

KILEY AND BURKE, JJ. CONCUR.

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FRED NEWMANN,

Appellee,

v.

NATHAN CIRALSKI and ANICE CIRALSKI,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed in the Municipal Court of Chicago, Fred Newmann alleged that he, a real estate broker, was employed by defendants, Nathan Ciralski and Anice Ciralski, husband and wife, to sell a parcel of real estate according to certain terms; that he procured a buyer ready, willing and able to purchase on the terms stated; and that they agreed to pay him a commission of 5% of the selling price of \$20,000. He asked judgment for \$1,000. Defendants denied the allegations. A trial before the court and a jury resulted in a verdict against defendants for \$1,000. Motions for a directed verdict, for judgment notwithstanding the verdict, and for a new trial were overruled, and judgment was entered on the verdict. Defendants appeal.

Defendants owned the premises commonly known as 4413-19 South State Street in Chicago. On or about June 10, 1945, plaintiff, a licensed real estate broker, called on Mr. Ciralski and told him that he had a client who wished to purchase the property. Plaintiff testified that Mr. Ciralski told him that if plaintiff could get the price Ciralski wanted he would sell it. Between June 10 and June 20, 1945 he talked to Ciralski at plaintiff's office. On inquiry plaintiff was informed that Ciralski's attorney was Max R. Naiman. Plaintiff then told Ciralski that he would get in touch with attorney Naiman and also asked the latter to get in touch with plaintiff's brother, attorney Edward

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R. Newmann. The purchase was to be made in behalf of a church being incorporated by attorney Newmann under the name of The St. Marks Church of God in Christ, of which the pastor was Reverend Odell Reed. He contemplated using a part of the building for religious services and another part for a cafeteria for his parishoners. The purchase price was to be \$20,000, with a down payment of \$5,000 and subsequent payments of \$100 a month, commencing one month after the execution of articles of agreement, plus interest at 6% per annum payable monthly. The deed was to be delivered when the \$20,000 had been paid.

There were conferences and telephone conversations between attorney Edward Newmann, representing the proposed purchaser, and attorney Max Naiman, representing the defendants. Attorney Newmann is a brother of plaintiff. He was recommended to Reverend Odell Reed by plaintiff. Although forms of articles of agreement were drafted by the attorneys, they were not signed. An owner's guarantee policy covering the property was delivered to attorney Newmann by attorney Naiman. There was a discussion as to whether the interest was to be 5% or 6%, and also as to whether the down payment should be \$4,000 or \$5,000. In the beginning the parties talked about a payment of \$5,000. Later there was talk about a down payment of \$4,000, with the commission of \$1,000 to be taken into consideration in making up the \$5,000, and with plaintiff looking to the church or the pastor for the payment of the \$1,000 representing his commission. Defendants maintain that the relation of broker and principal was not created between them, and that there was no contract of employment, express or implied. We have carefully read the transcript of the testimony. There were negotiations. Attorney Newmann, Reverend Reed and plaintiff testified for the latter, while attorney Naiman was the only witness for defendants. Attorney Newman, on direct examination, testified

that his brother, plaintiff, asked to have an additional clause inserted in the contract so as to "protect him on the 5% commission"; that attorney Naiman replied: "That is perfectly all right. Go ahead and put in that paragraph. That is the understanding and it is all right with me." Attorney Newmann testified further that the requested paragraph was put into the contract. On cross-examination, he testified that plaintiff called him and told him he was sending Reverend Reed down; that Reverend Reed was purchasing a piece of property in which plaintiff was acting as broker; that witness was to deliver a contract; that witness and attorney Naiman drafted the form of a contract and that he, attorney Newmann, dictated the following paragraph: "Upon the execution of this contract and the making of the initial payment, as herein provided, the sellers will pay to Fred Newmann, as broker in this transaction, a regular real estate board commission of five per cent (5%) on the total purchase price."

[1, 2] There is no denial in the testimony of plaintiff that he directed his brother, attorney Newmann, to have the provision protecting him in his brokerage commission inserted in the contract. This provision clearly states that plaintiff will be entitled to a commission upon the execution of the contract and the making of the initial payment. The contract was not executed. Defendants clearly had a right to agree with plaintiff that he would not be entitled to a brokerage fee unless the contract was executed and the initial payment made. In our opinion, plaintiff failed to make out a case and it was the duty of the trial court to direct a verdict.

For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and judgment is entered here for defendants and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE.

LEWE, P.J. AND KILEY, J. CONCUR.

that his brother, Plaintiff, asked to have an additional clause inserted in the contract so as to "protect him on the of commission" that attorney witness replied: "That is perfectly all right." ahead and out in that paragraph. That is the understanding and it is all right with me." Attorney witness testified further that the requested paragraph was put into the contract. In case - examination, he testified that Plaintiff called him and said that he was sending several more down; that Plaintiff had not been furnished a piece of property in which Plaintiff was taking an interest; that witness was to deliver a contract; that witness and attorney witness drafted the form of a contract and that he, attorney witness, dictated the following paragraph: "When the execution of this contract and the making of the initial payment, as herein provided, the seller will pay to said Plaintiff, as stated in this transaction, a regular real estate broker's commission of five per cent (5%) on the total purchase price." [] There is no denial in the testimony of Plaintiff that he directed his brother, attorney witness, to have the provision inserted in his brother's commission inserted in the contract. This provision clearly states that Plaintiff will be entitled to a commission upon the execution of the contract and the making of the initial payment. The contract was not executed. Reference clearly had a right to agree with Plaintiff that he would not be entitled to a brokerage fee unless the contract was executed and the initial payment made. In our opinion, Plaintiff failed to make out a case and it was the duty of the trial court to direct a verdict. For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and judgment is entered here for Defendant and against Plaintiff.

43759 - 43823

JOHN F. CUNEO,

Appellant,

v.

CITY OF CHICAGO, a Municipal
Corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE KILBY DELIVERED THE OPINION OF THE COURT.

This is the second appeal in this action, under Article II, Sec. 13 of the Illinois Constitution, to recover compensation for private property damaged for public use. In the first trial a jury awarded plaintiff \$217,345 and judgment was entered on the verdict. This court reversed that judgment and remanded the cause for a new trial (297 Ill. App. 404). Plaintiff sued out a writ of error in the Supreme Court on the ground that a constitutional question was involved. The Supreme Court dismissed the writ (372 Ill. 473). The case was retried without a jury. Judgment was for defendant and plaintiff has appealed. This opinion is upon the consolidation of causes numbered 43759 and 43823 of this court.

The property involved is the northeast corner of Randolph Street and Michigan Avenue, Chicago. It consists of about 90 feet on Michigan Avenue and about 70 feet on Randolph Street and is improved with a five story building about 60 years old covering the entire tract. Plaintiff purchased the land and building in 1925 for \$1,076,000.

Before the improvement in question was made, the grade of Michigan Avenue was about level and Beaubien Court which bounds the property on the east was 6 or 7 feet below this grade. A sidewalk on Randolph Street adjoining plaintiff's property led

slightly down grade to the east to a stairway of 4 or 5 steps which descended to Beaubien Court. South of this sidewalk an inclined cobblestone roadway connected Michigan Avenue and Beaubien Court. South of this roadway was a wooden passageway about street level. South of the passageway was the approach to the then Randolph Street steel and wooden viaduct. The property was bounded on the west, south and east by connected city streets. Pedestrian traffic passed the first floor of the building on Michigan Avenue and Randolph Street. Michigan Avenue's vehicular traffic passed at first floor level. The first floor of the building at the time was rented for sales and display. The basement accommodated a display room. The upper floors were used for light manufacturing. The Illinois Central Randolph Street suburban station was across Beaubien Court, east of plaintiff's property. Passengers traveling to and from the station passed plaintiff's property on the Randolph Street sidewalk or on the elevated wooden passageway.

In October 1930 the construction of a new Randolph Street viaduct and a new Randolph Street suburban station was begun. The work was done by the Illinois Central R. R. pursuant to an ordinance of the City Council of the City of Chicago, adopted December 15, 1930. This ordinance was designed to facilitate construction work provided for in an ordinance passed October 24, 1929. This latter ordinance amended an earlier comprehensive basic ordinance adopted July 21, 1919 and known as the Lake Front Development Ordinance. The new suburban station costing about a million dollars was opened for business about October, 1931. At this time the new viaduct had been completed from Michigan Avenue east about 300 feet, to the west line of the Michigan Central Railroad property. A barricade was placed at this point and no further work was done on the viaduct until 1935. Work was resumed in that year and the south half of the viaduct was completed to the Outer Drive and opened to traffic October 7, 1937. The north half of the viaduct has not been completed. It, and the North Randolph Street sidewalk have not been extended east beyond the point where the work was ended in 1931.

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

On February 10, 1931, plaintiff gave a release to the Illinois Central. He brought this action on December 14, 1931. The release which plaintiff gave is the subject matter of dispute. In the first appeal this court held that the trial court's exclusion of the release from evidence was reversible error. In the subsequent retrial the release was admitted, but the trial court excluded evidence of the circumstances surrounding its execution, offered by plaintiff to construe the release as limited to damages to the building only. Plaintiff contends the ruling was error. Defendant argues that the release is unambiguous, needed no parol evidence for its construction and is a general release precluding recovery. The pertinent parts of the release are that, in consideration of \$4,800, the plaintiff did "forever release and discharge * * * from any and all claims, demands and clauses (sic.) of action, of whatsoever kind, * * * whether past, present or future * * * permanent, continuing or otherwise, which may arise out of damages occasioned to the building on the premises above described, and the effects therein, and to the occupants of said building, by virtue of the construction of the East Randolph Street viaduct now being carried on * * * And I * * * agree that I will indemnify * * * from any claims * * * which may be made against it by any of the tenants * * * arising out of any damage which may be done to the said building, or the occupancy thereof, by virtue of the aforesaid work and improvements. * * *." We hold that the release is unambiguous. Parol evidence was inadmissible as an aid in its construction. It is not, however, a general release. It covers damage to the physical building and the effects therein and the occupants. It does not cover damage to the property as a whole. The trial court correctly considered only the damage to "land as land."

An important issue revolves about the question as to when the improvement was completed. This importance is due to the rule as to the measure of damages, namely, the fair, cash, market value of plaintiff's property before and after the improvement.

Kane v. City of Chicago, 392 Ill. 172. Plaintiff tried his case

on the theory that the improvement was completed in October, 1931, when the station was opened for business. Defendant's theory is that the completion date was October 7, 1937 when the viaduct had been connected with the Outer Drive and was opened to traffic.

The improvement was not completed when the station was opened for business. The station was only a part of the improvement. The excavation work began in November or December, 1930, and the caissons were sunk to bedrock. This was not for the purpose of building the station. The Illinois Central was permitted under the ordinances to use the space under the viaduct as part of its station. The viaduct could not be said to be completed in October of 1931, for it then ended in midair at the west boundary of the Michigan Central Railroad property. It is true that only the south half was completed October 7, 1937 and that several other improvements provided for in 1919 and 1929 ordinances have not been commenced. The viaduct was not at that date completed in the sense that no further work was required on it under the ordinances. It was completed, however, in the sense that it was operable as a connecting link to the Outer Drive and in that it furnished a reasonable norm for use in determining the fair, cash, market value of plaintiff's property in the light of the damage done and the benefits accrued. Defendant argues, and we agree, that to hold the improvement was completed in October 1931, would permit plaintiff to recover damages unrelated to the benefits arising out of the completion of the main purpose of the improvement. We believe the court correctly decided that the improvement was completed October 7, 1937. Monarch Refrigerating Co. v. Chicago, 328 Ill. App. 547; Schlosser v. Sanitary District, 299 Ill. 77.

The issue of damages was presented principally by expert witnesses for each party. The sets of experts differed in their opinions as to when the Economic Depression began, as well as the value of plaintiff's property. The question of the Depression is

important since, according to defendant's theory, plaintiff's property, immediately before as well as after the improvement, was affected by the Depression; whereas, under plaintiff's theory the Depression had no effect on the property before the improvement or after, late in 1931. Plaintiff had the burden of proving that the value of his property after the improvement was less than its value before the improvement and that the loss in value was proximately caused by the construction of the improvement. The trial court found that plaintiff had not proved those elements by a preponderance of the evidence. The court said that even though the property was damaged, benefits accruing to the property exceeded the damage.

Plaintiff contends the court erred in admitting testimony comparing plaintiff's property with other properties where no proper basis of comparison was made and of testimony of rentals and property values subsequent to the first trial in 1934. The principal factor relied upon by plaintiff in proving damage was the change of grades in the Michigan Avenue and Randolph street sidewalks adjoining his property. The level of the sidewalk on Michigan Avenue was changed so that it was 3 feet higher at the southwest corner of plaintiff's property than at the northwest corner and 6 feet higher at the southeast than at the northwest corners of the property. Testimony for plaintiff was that the new grades were such that neither plaintiff's nor any other building could be adjusted to such changed grades so as to be rentable economically. The court admitted evidence of the adjustment of the first floors of other buildings to changed grades of sidewalks. This evidence did not expressly extend to the question whether these floors were adjusted economically, but it is our view that this question was for the court. We see no error in the admission of the evidence.

We have already held that the improvement was completed October 7, 1937. The court properly, therefore, admitted testimony of rentals and values as of that date. There is no merit to the contention that the court should have restricted this testimony to conditions in or before 1934. The court heard testimony of rentals and value after October 7, 1937 to the time of the trial and of rental income from plaintiff's property at the time of the trial. The rule is that the time limitation upon the introduction of evidence of value after the improvement is within the sound discretion of the court. Gehegan v. Union Elevated Railroad Co., 266 Ill. 482; McCoy v. Union Elevated Railroad Co., 271 Ill. 480. The rule requires, however, that the evidence be considered only as it bears upon the value of the property before and after the improvement. We see no abuse of discretion in this respect.

Plaintiff claims that the damage to his property resulted from, among other causes, the removal of street traffic and buying power from the area. The parties agree that mere diversion of traffic is not an element of damage. Hohmann v. City of Chicago, 140 Ill. 226; City of Chicago v. Jackson, 196 Ill. 496. Plaintiff insists that the removal of the old Randolph Street incline to Beaubien Court and the Randolph Street sidewalk, and the construction of the new dead-end sidewalk and viaduct approach were not a mere diversion of traffic. We agree that the improvement cut off access via street and sidewalk from Beaubien Court to the Randolph Street and Michigan Avenue frontages of plaintiff's property and that consideration should be given to any damage suffered thereby. He had no right, however, to complain of the diversion of patrons of the Illinois Central from the sidewalk adjoining his property or from the passageway further south.

Plaintiff contends that the court's finding and judgment are against the manifest weight of the evidence. His experts fix the value and improvement at approximately \$1,250,000 exclusive of the building. Their opinion of the value after the improvement ranged from \$860,000 to \$945,000. We have already stated that

they did not consider the Depression a factor in establishing the pre-improvement value, because it was then their belief that economic prospects were good. They saw no appreciable effect of the Depression on the post-improvement, October 1931, value. They ascribed the reduced value principally to damage to the first floor. These witnesses gave no consideration to the value of the property in 1937, though one considered the property worth no more in 1937 or 1945 than it was in 1931. When the court expressed interest in having plaintiff's view of the value in 1937, plaintiff said he would be "glad to find out and tell you what I think." The record does not show that he did so. Some of these witnesses used a 6 percent factor applied to the 1930 income in arriving at their opinion of the pre-improvement value. Their post-improvement value, however, was based upon future prospects late in 1931 or early 1932. They admitted that the prospects were erroneous and "too optimistic" and that starting in 1932, rents began to decrease.

Plaintiff insists the trial court gave no weight to loss of rentals of the first floor. His experts attributed the loss to the changes of grade in the sidewalks making the first floor less accessible and less desirable. It appears that the first floor and basement produced rentals of approximately:

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| \$46,000 | in 1928 |
| \$57,000 | in 1929 |
| \$45,300 | in 1931 |
| \$16,600 | in 1932 |
| 550 | in 1933, |

and that for seven years between 1932 and 1939 the first floor was vacant because unrentable. The rental income, exclusive of signs, dropped from more than \$70,000 in 1930 to about \$24,000 in 1944. This figure, however, included income of only \$1,475 for the first floor. There is no dispute among the experts that the advertising value of the property did not suffer from the improvement.

Defendant's experts value the property and the improvement at from \$850,000 to \$935,000 and after October 7, 1937 at from \$585,000 to \$675,000. They attribute the reduced value not to the improvement but to the Depression. Their view was that had it not been for the improvement, the Depression would have brought the value of plaintiff's property after the improvement to about \$450,000. The testimony of defendant's witnesses was that rentals began to decrease because of the Depression as early as 1930; that the old Randolph Street viaduct led to a gravel road in Grant Park and to the Lake Front; that plaintiff's property has greater accessibility and prominence after, than it had before, the improvement; that the basement has greater merchandise value than before; that the new Randolph Street viaduct has increased the flow of traffic by plaintiff's property and thereby appreciated its value; that the change of grades at the first floor level had no effect on the rentability of the first floor; that the 7 year vacancy on the first floor had no effect on the, and was not indicative of, reduced, value; that the only important frontage for rentability was Michigan Avenue; that the appearance of the property after the improvement gave it greater value than it had under the unsightly appearance before the improvement; that the previous access to Beaubien Court gave it no value; that the sidewalk was used by Illinois Central patrons and the cobbled roadway only by service trucks; that 50,000 additional pedestrians are brought daily along plaintiff's property at basement level by reason of the new Illinois Central depot; and that the improvement gave accessibility to future air right development of the property east and north of it.

Plaintiff made a motion to strike the testimony of defendant's witnesses on the ground that their opinions were not based on or

included in proper elements of benefits. He says the improper elements were those which were purely speculative, such as future development of air rights and fulfillment of the 1919 and 1929 ordinances; those due to war activity, such as increased passenger travel to and from the Illinois Central depot; those due plaintiff's own activity, such as transformation of the basement area through investing money in improvement and rental of space from the Illinois Central and those arising from improved appearance, increased advertising value and increased accessibility. He says furthermore, that these experts disregarded the loss of earnings on the first floor for 7 years due either to the obstruction of the Kiosk in the Michigan Avenue sidewalk, or its substitute, the inner stairway for patrons of the Illinois Central through plaintiff's property.

If witnesses base their opinions in a material degree upon elements of advantage which cannot be legally considered and which he cannot or will not separate from those which may be legally considered, the opinions are not competent. City of Chicago v. Farwell, 284 Ill. 491. Witness Trainer for plaintiff first mentioned the air rights. Defendant's witnesses followed by attributing increased value by reason of accessibility to the future development of air rights as well as to increased value from completion of 1919 and 1929 ordinances. This testimony of value is purely speculative and has no proper place in the measure of benefits. West Side Elevated Ry. Co. v. Stickney, 150 Ill. 362. There is no reasonable assurance that either development will take place. We think evidence of increased passenger traffic at the Illinois Central station at the time of the trial tended to show increased value of the property in October of 1937. Plaintiff spent \$1,000 in connecting his property at basement level with the Station concourse and changed the south wall of the basement. This fact and his leasing of area in the Station from the Illinois Central, could be considered in diminution of the increased value to his property by reason of these factors. The facts of improved appearance, increased vehicular traffic, increased advertising value and increased accessibility were proper considerations bearing upon the question

included in proper elements of benefit. He says the increased elements were those which were purely speculative, such as future development of air rights and fulfillment of the 1918 and 1929 ordinances; and due to war activity, such as increased passenger travel to and from the Illinois Central depot; these are plaintiff's own activity, and as a transposition of the basement area through investing money in improvement and rental of space from the Illinois Central and since existing from improved appearance, increased advertising value and increased accessibility. He says furthermore, that as an expert disregarded the loss of earnings on the first floor for 7 years due either to the obstruction of the block in the highway or otherwise, or its substitute, the inner stairway for portion of the Illinois Central through plaintiff's property.

It witnesses that this opinion is a material issue upon elements of advantage which cannot be legally considered and which he cannot or will not separate from those which may be legally considered, the opinions are not competent. City of Chicago v. Harvey, 364 Ill. 481. Witness further for plaintiff first mentioned and his rights. Defendant's witness followed by stating increasing value by reason of accessibility to the future development of air rights as well as to increased value from completion of 1918 and 1929 ordinances. This testimony of value is purely speculative and has no proper place in the measure of benefit. East Side Elevated Ry. Co. v. Seligman, 150 Ill. 368. There is no reasonable assurance that either development will take place. He thinks evidence of increased passenger traffic at the Illinois Central station at the time of the trial tended to show increased value of the property in December of 1937. Plaintiff spent \$1,000 in connecting his property at basement level with the station concourse and changed the south wall of the basement. This fact and his leasing of area in the station from the Illinois Central could be considered in diminution of the increased value to his property by reason of these factors. The facts of improved appearance, increased vehicular traffic, increased advertising value and increased

of damage to plaintiff's property. There was evidence which tended to prove each of those elements.

It appears from the evidence that the Stever tenant who paid the rents for the first floor, basement and signs did not renew its lease at its expiration in 1932, and another tenant went out of business in 1932. The trial court may have considered that the drop in rental income was not due to construction of the improvement, (City of Chicago v. Pulcyn, 129 Ill. App. 179), but the Depression. (Great Northern Ry. v. Weeks, 297 U. S. 135). Plaintiff points out that defendant's experts said the property in 1945 had recovered its 1930 value. He asks why have not the first floor rentals kept pace. The court probably considered that rentals for the first floor did not keep pace, because the character of the building had been changed by the improvement, in as much as pedestrian traffic had been diverted from the first floor level, but that, nevertheless, the value of the whole property was greater because of the improvement. At the time of the trial negotiations were in progress for a tenant for the first floor at \$1,000 per month.

In the subsidewalk space on Michigan Avenue plaintiff constructed a tavern which was leased commencing in 1942, and which can be entered from the Station. Originally, as part of the improvement a kiosk was built in Michigan Avenue sidewalk and the stairway beneath it furnished ingress and egress to and from the Station. In 1936 an agreement was made between the Illinois Central and plaintiff, whereby the kiosk was removed and the opening into the sidewalk closed in consideration of plaintiff providing an easement through the entrance and a stairway through his building into the station. While the basement area produced about \$1,000 prior to the improvement, commencing in 1942 from the tavern and also from an arcade and restaurant partially on plaintiff's property at basement level and partially on the space leased from the Illinois Central, plaintiff has derived an income which had grown to approximately \$10,000

of damage to Plaintiff's property. There was evidence which tended to prove each of those elements.

It appears from the evidence that the lower tenant who built the house for the first floor, basement and signs did not renew its lease at its expiration in 1935, and another tenant went out of business in 1935. The trial court may have considered that the drop in rental income was not due to deterioration of the improvements, (*City of Chicago v. Helwig, 135 Ill. App. 3d 379*), but the depreciation. (*Great Northern Ry. v. Sells, 287 N. W. 153*). Plaintiff claims that defendant's experts said the property in 1945 had increased its 1935 value. He asks why have not the first floor tenants who built the house probably considered that rental for the first floor did not keep pace, because the character of the building had been changed by the improvement, in as much as additional traffic had been diverted from the first floor level, but in it, nevertheless, the value of the whole property was greater because of the improvement. At the time of the trial negotiations were in progress for a rental for the first floor at \$1,000 per month.

In the undisputed space in Plaintiff's evidence which constituted a tavern which was leased commencing in 1945, and which can be entered from the station. Originally, as part of the improvement a room was built in addition to the existing building. In 1945 an agreement was made between the Illinois Gas and Electric Company, whereby the room was removed and the building into the sidewalk closed in consideration of Plaintiff's providing an easement through the entrance and a stairway through his building into the station. While the basement area produced about \$1,000 prior to the improvement, commencing in 1945 from the tavern and also from an arcade and restaurant partially on Plaintiff's property at basement level and partially on the space leased from the Illinois Central, Plaintiff has derived an income which had grown to approximately \$10,000

at the time of the trial.

The court erroneously permitted defense testimony of sales of properties in the vicinity of plaintiff's, at or near the time of the trial, where the value per square foot was \$32.00. Defendant's experts considered the square foot value of plaintiff's property after the improvement at about 100. They thought that at the time of the trial it had regained its 1930 value, which they considered about \$150 per square foot. There is no contention by anyone that the post-improvement value was less than \$100. We cannot see any relevancy to testimony of sales at less than \$100.

We have found errors in admission of testimony. We believe there is ample competent evidence, however, to support the court's conclusion. The parties agreed that the court should view the premises. The parties do not say that the court did not do so. The judgment rested largely upon factual matters within its province. We see no reason to disturb the judgment and we, accordingly, affirm it.

AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

WILHELMINE L. KELLEHER,
 Plaintiff - Appellee,
 v.
 DANIEL D. KELLEHER,
 Defendant - Appellant.

APPEAL FROM
 SUPERIOR COURT
 COOK COUNTY.

3311A. 617

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a divorce action with decree in plaintiff's favor.
 Defendant has appealed.

Plaintiff filed her suit June 30, 1944, alleging that she had been a good and virtuous wife; that through no fault of hers, defendant forced her to leave home October 16, 1942; that for more than two years prior to the filing of the complaint defendant "commenced the excessive use of intoxicating liquors and became guilty of habitual drunkenness"; that he was constantly on "sprees" and remained in an intoxicated condition almost continually, "was unfit to attend to business" and abused her. She asked for a divorce, determination of interest in their joint property, and alimony. Defendant answered and, among other things, denied all allegations with reference to his intoxication. The trial court found defendant had been guilty of habitual drunkenness within a space of "two successive years prior to the filing of the complaint", as "plaintiff charged", and that all allegations in the complaint were proved. A divorce was granted and the court reserved jurisdiction to determine the other issues.

Defendant contends plaintiff did not prove the allegations of her complaint; failed to prove habitual drunkenness; that the findings of the court are against the manifest weight of the evidence; and that the court accordingly committed error in entering the decree.

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and, notwithstanding all of those things, the fact is that

to 1972, and to other power companies, and to cover a deficit within a 1000 of "unproductive" value.

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It is not a matter of whether or not the defendant is a member of the organization, but whether or not the defendant is a member of the organization at the time of the offense.

findings of the court are assigned the weight of evidence

and that the court should not be troubled by the fact that the evidence is circumstantial.

* 96195b

The parties were married May 2, 1912. They had 4 children, 3 girls and a boy who, at the time of the trial, were adults.

Plaintiff testified that defendant drank "continually" "beer, wine and anything" and that he had started at least 20 years ago during prohibition. She testified that when drunk he abused her and, on one occasion, the police were called in 1940 when he was tearing her clothes off during an argument. A married daughter testified that she had lived off and on with her parents for several years preceding the trial; that her father worked nights and was drunk every evening when she came home;^{and} that she "couldn't take it" and left. She said she had not lived with her parents for two years before the complaint was filed, but had visited several times and he was always drinking and intoxicated. One unmarried daughter testified that her father drank a lot; that he got drunk a couple of times a week and fought with her mother; and that she had not seen her father for a couple of years. Another unmarried daughter testified that he drank whiskey and became intoxicated about three times a week; that she had seen him only twice in the last two years and that he was then sober. A neighbor Mrs. Eldridge testified that defendant drank "continually" every day of the week and was very abusive; that she saw him twice a week during the two years preceding the filing of the complaint; and that during that time he had visited her home twice, was intoxicated each time and on one occasion her husband ordered him out.

Defendant is an employee of the United States Post Office and has been for 20 years. He worked in the Lock Box section and "they sell stamps at my window." He has never lost time on his job through drinking. He denied that he was an habitual drunkard but claimed that his wife was. He said he had frequently requested her to return to their home and that she had refused. It seems

that his son, daughter-in-law and granddaughter lived with him after plaintiff and the girls left in 1942. At the time of the trial the son, according to defendant, was "living with the mother and little baby." His daughter-in-law and her girl friend were living with him at the time of the trial. The former testified that she knew him since February in 1945, lived in his house since July 1945 and had never seen him drunk since she knew him.

We think the evidence failed to prove that defendant was unfit to attend to his duties. The fact that he was able to attend to his duties, however, is not the test of habitual drunkenness. Richards v. Richards, 19 Ill. App. 465. Defendant refers us to Shorthose v. Shorthose, 319 Ill. App. 385 on the point that occasional acts of drunkenness do not make one a habitual drunkard. Suffice to say that the facts in that case are different from those in the instant case. The court in that case also said that continuous drunkenness is not necessary to mark one as an habitual drunkard. Defendant also refers us to Grikietis v. Grikietis, 319 Ill. App. 216 and Ash v. Ash, 327 Ill. App. 656. Those cases are not helpful to the defendant's case.

The principal contention of the defendant is that the finding that he was drunk for two successive years before the complaint was filed is against the manifest weight of the evidence. The statute does not require such a finding. Dorian v. Dorian, 298 Ill. 24. Moreover, Mrs. Eldridge gave testimony of defendant's drunkenness for the two years preceding commencement of plaintiff's action.

We believe the testimony is sufficient to support a decree on the grounds of habitual drunkenness of defendant. While the testimony of the witnesses in defendant's family was general in nature, the testimony of Mrs. Eldridge was more definite and was

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uncontradicted. Furthermore, the testimony in support of the defense was not convincing and was of a negative character. Ash v. Ash, 327 Ill. App. 656. We think that under the cases cited by both parties, the testimony sufficiently showed that defendant was an habitual drunkard.

For the reasons given the decree is affirmed.

AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

unusually large, and, however, dated 1900.

The following table shows the results of a series

of experiments conducted in 1900, 1901, and 1902.

By the use of this method, the following results

have been obtained:

The following table shows the results of a series

of experiments conducted in 1900, 1901, and 1902.

By the use of this method, the following results

have been obtained:

43907

STELLA ASTRAUSKAS, STANLEY MARCHINEUS,
and PETER GANIONIS, d/b/a The 2507 Club

Plaintiffs - Appellants,

v.

JUSTIN ASTRAUSKAS, JACK SAMUELS, JUSTIN
MACKIEWICH, VICTORIA MACKIEWICH, HELEN
KUCHINSKAS, JOHN KUCHINSKAS, THEODORE
ZENGULIS and ANNA ZENGULIS,

Defendants - Appellees.

PER CURIAM.

This is a bill of review based on newly discovered evidence. Plaintiff seeks to reverse a partition decree of the Superior Court and the subsequent decree of sale and order of confirmation; to void the master's deed, executed pursuant to the sale, and several subsequent deeds; and to void a master's deed in a separate Superior Court proceeding. The trial court on defendant's motions dismissed the complaint for want of equity.

Plaintiff and her husband were on July 10, 1942, owners in joint tenancy of real estate and improvements thereon in Chicago, Illinois. On that day he filed a partition suit in Case No. 42-S-9572 against his wife. A decree of partition was entered December 15, 1942 and a decree of sale December 22, 1942. No disposition was made in the decree of Mrs. Astrauskas' homestead right. A master in chancery sold the property for \$9,300 to Justin Mackiewicz and Victoria Mackiewicz on January 19, 1943. On February 11, 1943 they conveyed it to Helen Kuchinskas. Helen Kuchinskas and her husband on May 6, 1944 then conveyed the premises to Theodore Zengulis and Anna Zengulis, his wife.

The Zengulises thereafter sued Mrs. Astrauskas and her daughter Dorothy Astrauskas in the Superior Court, Case No. 44-S-13319, to determine the homestead rights and to quiet title in the

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

plaintiffs. A decree entered June 6, 1945 upon a master's report fixed the value on Mrs. Astrauskas' homestead and found that money representing its value had been paid in the court; decreed that she had no further title or interest in the property; quieted title in the plaintiffs; enjoined Mrs. Astrauskas and her daughter Dorothy from asserting hostile claim; and ordered a master in chancery to convey to the Zemgulises all interest of Stella Austrauskas. Mrs. Austrauskas appealed from that decree and the appeal was dismissed in this court. Thereafter, she was evicted from the premises.

It appears from the complaint that Justin Astrauskas was "confined * * * in the Cook County Psychopathic Hospital" under an order of the Municipal Court on July 27, 1942, and that two days previously he had quit-claimed his interest in the property to Jack Samuels, defendant; that plaintiff filed a motion to dismiss on the ground of her husband's incapacity to sue; that the motion was never disposed of; that on January 16, 1943, before the judicial sale in the partition suit, she made a motion to vacate the decrees of partition and sale and discontinue the proceeding; that this motion was based upon a written agreement of reconciliation between her husband and herself, under which the partition suit should have been dismissed under Section 42 of the Partition Act; and that this motion was denied. It further appears that prior to the judicial sale, she made an agreement with defendant Mackiewicz, under which the latter would purchase the property for her at the sale and refinance it for her; and that although this agreement was confirmed by Mackiewicz in April 1944, nevertheless, the property although purchased by him, was conveyed to other grantees. Plaintiff claims in her complaint, "That those matters hereinabove set forth which were not presented in defense in the original suit for partition, were not so presented because the Plaintiffs herein did not know of the same at that time, and that such knowledge whereof was acquired after the conclusion of the said partition suit. That * * * Plaintiffs * * * exercised due diligence * * * and that delay for

filing this suit" was due to litigation in the partition suit and the suit to quiet title. The motion to dismiss was grounded on laches; on the knowledge of plaintiff of the "new matter" at the time of the partition proceeding; the failure of plaintiff to obtain leave to file the instant suit; and res judicata by virtue of the decree in the suit to quiet title.

Bills of review for newly discovered evidence are not favored and cannot be filed of right, but depend upon the court's discretion. Columbia Casualty Co. v. Mitchell, 329 Ill. App. 325. Plaintiff's suit was dismissed July 3, 1946. She filed a written request for leave to file the suit thereafter on July 6th. Plaintiff in her brief sets forth 13 points and authorities. Her argument commences with No. 8. The preceding points are, therefore, considered waived. Rule 7, App. Court Rules. The points waived included those which were designed to meet the attack of the motion to dismiss.

The partition decree was entered December 15, 1942. The instant complaint was filed March 23, 1946. There is no showing made why no appeal was taken in the partition proceedings to test the court's rulings, or lack of ruling, on the motions which plaintiff presented before and after the decree was entered. It appears from the complaint, moreover, that plaintiff in effect approved the partition proceeding, since she alleges making an agreement with Mackiewicz to purchase at the sale. There is no showing when the newly "discovered evidences" relied upon by plaintiff came to her knowledge, from which we can review the question of the court's abuse of discretion. It is not enough to say that this evidence was not available at the trial and that knowledge of it came after the proceedings were concluded. The same is true as to the showing of diligence. It is not enough to explain away an

undue delay by saying that plaintiff has been busy in court with proceedings in the partition case and the related suit to quiet title.

We see no need of going further. In view of what we have already said we hold that the court did not abuse its discretion in dismissing the complaint and the decree is affirmed.

DECREE AFFIRMED.

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44076

S. J. BLUME, INC., a Corpora-
tion,

Appellee,

v.

VERNON BAIN FLOWER CO., INC.,
a Corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover \$1,826.74 claimed to be due for goods sold and delivered to defendant. Defendant denied liability and filed a counterclaim. On December 6, 1947, there was a jury trial and a verdict and judgment against plaintiff and in favor of defendant on its counterclaim, for \$78.48. Plaintiff filed a motion for a new trial and on December 19, 1946, the motion was sustained and a new trial granted. Afterward the amount of the appeal bond was fixed, the bond filed and approved. December 26, defendant filed a notice of appeal and proof of service and afterward the report of proceedings was approved and filed.

The steps taken by defendant were in nowise authorized by the Statute or rules of court. Sec. 77, of the Civil Practice Act, ch. 110, Ill. Rev. Stat. 1945, states that "Appeals shall lie to the Appellate or Supreme Court, in cases where any form of review may be allowed by law, to revise the final judgments, orders or decrees of the Circuit Court, the Superior Court of Cook County, the County Courts, the City Courts and other courts whose judgments, orders and decrees are reviewable ***. An order granting a new trial shall be deemed to be a final order, but no appeal may be taken therefrom, except on leave granted by the reviewing court, or by a judge thereof in

44078

G. J. BLUME, INC., a Corporation,
Appellee,

v.

WYNNON BAIN ELLIOTT CO., INC.,
a Corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
CO. OF LOUIS.

MR. PRESIDING JUSTICE OF COMMON PLEAS THE COURT:

Plaintiff brought an action against defendant to recover

\$1,823.74 claimed to be due for goods sold and delivered to

defendant. Defendant denied liability and filed a counterclaim.

On December 8, 1947, there was a jury trial and a verdict and

judgment against plaintiff and in favor of defendant on its

counterclaim, for \$5,443. Plaintiff filed a motion for a new

trial and on December 12, 1948, the motion was granted and a

new trial granted. Affidavit the amount of the appeal bond

was fixed, the bond filed and approved. December 23, defendant

filed a notice of appeal and proof of service and affidavit the

report of proceedings was approved and filed.

The steps taken by defendant were in notice authorized

by the statute or rules of court. Sec. 77, of the Civil

Practice Act, ch. 113, Ill. Rev. Stat. 1947, states that

"Appeals shall lie to the Appellate or Supreme Court, in cases

where any form of review may be allowed by law, to review the

final judgments, orders or decrees of the Circuit Court, the

Superior Court of Cook County, the County Courts, the City Courts

and other courts whose judgments, orders and decrees are review-

able *** An order granting a new trial shall be deemed to be

a final order, but no appeal may be taken therefrom, except on

leave granted by the reviewing court, or by a judge thereof in

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vacation on notice to adverse parties and petition presented to the reviewing court within 30 days after the entry of the order or within any extended period granted within such 30 days or any further extension thereof."

No petition was filed in this court asking for leave to appeal from the order awarding a new trial. The procedure followed was in no way authorized by the Statute and accordingly the attempted appeal is dismissed.

APPEAL DISMISSED.

Niemeyer, J., and Feinberg, J., concur.

vacation on notice to adverse parties and petition presented to the reviewing court within 30 days after the entry of the order or within any extended period granted within such 30 days or any further extension thereof."

No petition was filed in this court seeking for leave to appeal from the order awarding a new trial. The proceedings followed was in no way authorized by the Statute and accordingly the attempted appeal is dismissed.

AMERICAN BAR ASSOCIATION

Wienaker, J., and Weinberg, J., concur.

44086

LIGHTING PRODUCTS, INC.,
an Illinois Corporation,
Appellant,

v.

GEORGE A. FULLER COMPANY,
a New Jersey Corporation,
Appellee.

APPEAL FROM COUNTY COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover \$1,659.36, a balance claimed to be due for manufacturing fluorescent lighting fixtures to be used by defendant in the construction of an atomic bomb plant at Decatur, Illinois. At the close of plaintiff's evidence defendant moved for a judgment in its favor, the motion was sustained and judgment entered accordingly. Plaintiff appeals.

The record discloses that defendant had a contract with the War Department to construct an atomic bomb plant at Decatur, Illinois. Defendant entered into a subcontract for certain fixtures to be used in the construction of the plant with the Markstone Manufacturing Company, a co-partnership, of Aurora, Illinois. The amount to be paid for these fixtures was \$32,144.82. The Markstone Company was unable to make proper deliveries and plaintiff entered into an agreement with the Markstone Company to make the fixtures. A number of the fixtures were made and delivered at Decatur; payments were made on account and plaintiff being unable to collect the balance, brought this suit. There is considerable evidence in the record to the effect that plaintiff's books showed the account was with the Markstone Company. Payments were made, sometimes by checks of the defendant company which were payable to the Markstone Company, and at least

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

2.

one of them when delivered to Markstone was immediately endorsed by that concern and turned over to defendant. The evidence further shows there were a number of meetings between the representatives of the three parties; and that there was considerable correspondence which is in the record.

Plaintiff's theory of the case is that it refused to proceed with the work unless it could be assured of payment and that the Markstone Company was not in a position to make prompt payments, if payments at all, and that since defendant needed the fixtures promptly it could not proceed with the construction of the plant as called for by defendant's contract with the Government and therefore the defendant agreed to see that plaintiff was paid promptly as deliveries were made and therefore defendant was primarily liable to plaintiff. On the other side defendant's position is that it made no promise either primary or collateral to pay plaintiff for the work it did. That the obligation to pay for the work done by plaintiff was on the Markstone Company and that all the evidence fails to make out a prima facie case of any such promise by the defendant and therefore the judgment of the trial court was proper and should be affirmed.

Kenneth Lacy, president of the plaintiff company, testified as to meetings held by representatives of plaintiff, defendant, and the Markstone Company and that Mr. Gardner, a representative of defendant company was at some of these meetings and that at one of them, I asked him "to assure us that we were going to get our money if they were going to get fixtures. He agreed to arrange it in such a way that they would pay Mr. Marks [of the Markstone Company] in the presence of a representative of ours and that the check would be signed over to us; either that or we would receive check directly for payment of the fixtures that had been shipped up to that date." That afterward plaintiff had further trouble in receiving payment

one of them then delivered to the other a letter

dated by that date and signed by the

other party and a letter dated the same date

the representative of the other party

consequently some time after the date

Plaintiff's theory of the case is that

proceed with the other party in order to

that the defendant's theory of the case is that

event, it is a matter of fact that

the first party is a party to the

of the first party is a party to the

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the first party is a party to the

defendant's theory of the case is that

or defendant's theory of the case is that

obligation to pay for the first party is a party to the

Maritime Company is a party to the

a party to the

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affirmative.

first party is a party to the

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defendant, and the first party is a party to the

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is that one of them, the first party is a party to the

we are going to pay for the first party is a party to the

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to us; either that or we would have a party to the

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That afterward plaintiff had further to pay for the first party

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for the work it had done and further negotiations were had between the representatives of the three parties. On cross-examination he testified that at different times he talked to Mr. Gardner, personally and over the telephone. That at one of the meetings Mr. Gardner was at defendant's office in Decatur. "He [Gardner] was in Decatur and I informed him we could not ship material with the credit situation as it stood. As I recollect his answer at that time, was that the George A. Fuller Company would in some way back us up in getting our payment. Nevertheless he made no specific promise at that time. We told him that we would - if the George A. Fuller Company would in any way assure our payments, that we would ship merchandise, and we did ship the merchandise. We only had his verbal statement from George A. Fuller Company without any promise." That later he had another conversation with Mr. Gardner and wrote him a letter and advised Gardner that, "At that time we had the balance of the merchandise practically ready to go to him, and I told him because of the credit situation of Markston, that we absolutely would not ship merchandise unless we were assured of getting the money for the balance of the job. He said that they would take care of it in the same way that they had before, and I send a man in and collect the check which would be turned over to us directly for our share. We never received the check for our share, that is what we are still kicking about."

There is considerable other evidence in the record but since we have reached the conclusion that the judgment must be reversed and the cause remanded for a new trial, we refrain from discussing it further.

Upon a consideration of all the evidence, we are of opinion that the plaintiff made out a prima facie case.

Hartley Bros. v. Varner, et al., 88 Ill. 561; Section 184, p. 244, Vol. 1, Restatement of the Law Contracts; Kampman v.

for the work it had done and further to the fact that
between the two sentences of the first sentence, and thus
examination he has filed that at this time he believed
Mr. Gardner, personally and not through the
the meeting and Gardner was at the time in the
"The Gardner was in position to know the
ship returned to the United States at that time.
recalled his answer at that time, and that the same was
Germany would in some way that is in being our
nevertheless as we have a specific notice to that
him that he would - if the reason, which Gardner would in
way seems to be very clear, that a specific notice, which
and the same thing. Gardner had the same thing at
from George A. Gardner to my friend, which is the
and another conversation between Gardner and the
letter and that is the same thing, and that is the
of the particular matter to go to the
the purpose of the article which is in the
ly would not this person, which is the same thing
the money for the purpose of the same thing, which is
take care of it in the same way, which is the same
a person had called and the same thing, which is the
directly for our own use, which is the same thing
there, that is all the same thing, which is the same
There is some other matter which is the same thing
since we have reached the point in the first sentence
referred to the other person, which is the same thing
from discussing it further.

Upon a consideration of all the facts, and the
opinion that the plaintiff is not a high grade bank.
Hettley Bros. v. Hettley Bros., 117, 501; section 124,
p. 244, Vol. 1, 1st edition of the law book, 1904, v.

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Pittsburg Contracting and Engineering Co., (316 Pa. 502)

99 A.L.R. 76.

In the Hartley Bros. case the facts were that Hartley Bros. were conducting a store in Edgar county and were selling merchandise on credit to A. W. Reubottom, who was working for or with defendant, Varner. That Varner was in plaintiff's store and plaintiffs told him that they did not intend to extend any further credit to Reubottom because he had not paid for the goods sold to him; "that Varner replied to this that Reubottom was all right, was at work for or with him, and if appellants [Hartley Brothers] would sell him goods he (Varner) would see it paid." Afterwards plaintiffs sold further goods on credit to Reubottom which he did not pay for. Suit was brought against Varner and he was held liable.

In Blank v. Dreher, et al., 25 Ill. 293, the court speaking by Mr. Justice Breese, said: "Whether an undertaking is original or collateral merely, is to be determined, not from the particular words used, but from all the circumstances attending the transaction."

Since we hold that the plaintiff made a prima facie case, the motion of defendant made at the close of plaintiff's evidence raised a question of law. Helm v. Comm. Men's Assn., 279 Ill. 570; Anderson v. Board of Education, 390 Ill. 412, and for the error in sustaining the motion and entering judgment in defendant's favor, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Niemeyer, J., and Feinberg, J., concur.

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44009

NATHAN NETTER,
Appellee,

v.

MARION KING,
Appellant.

)
)
) APPEAL FROM CIRCUIT COURT,
)
) COOK COUNTY.

331 I.A. 619

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action against defendant to recover damages for personal injuries, resulting from the alleged negligence of the defendant in driving her automobile upon one of the public streets of the City of Chicago. A trial with a jury resulted in a verdict for plaintiff in the sum of \$5,000, upon which judgment was entered. This appeal followed.

A summons was issued in this case and service had upon the defendant under section 20a, par. 23, chap. 95-1/2, Ill. Rev. Stat. 1945, which provides that in the case of a nonresident using the highways of Illinois, and the use of which results in damage or loss of personal property, that the Secretary of State may be considered the lawful attorney upon whom process may be served.

The defendant filed a special appearance limited to questioning the jurisdiction of the court and to quash the summons, in which the statement appears that "at the time of the purported accident, she was not within the jurisdiction and subject to the jurisdiction of the Circuit Court of Cook County, but to the contrary was a resident of the State of Wisconsin." An unverified written motion to quash, accompanying the special appearance, alleged as the ground for the motion that the complaint filed herein states on its face, in paragraph 7, that at the time of the alleged accident she was

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a citizen of the State of Illinois, and that later on to-wit November 15, 1942, ceased to be a resident of the State of Illinois; that, therefore, the complaint on its face shows that at the time of the alleged accident she was a resident of the State of Illinois and later left the jurisdiction of this State.

It appears from the record that the complaint was filed May 24, 1944. The accident occurred May 26, 1941. It is alleged that a previous suit for this accident was filed November 17, 1941, in the Superior Court, which was dismissed for want of prosecution June 10, 1943; that from and after November 15, 1942, defendant has not been a resident of the State of Illinois and still remains a nonresident of the State of Illinois. The instant suit was brought within the year following the involuntary nonsuit or dismissal.

It is contended that since the complaint alleged that "From and after November 15, 1942, defendant has not been a resident of the State of Illinois; and defendant still remains a nonresident of the State of Illinois", it carries an inference against the pleader that defendant was a resident of Illinois up to November 15, 1942, and was, therefore, a resident at the time the accident occurred, which would not make the statute cited applicable, for the purpose of service of process. We cannot agree with the defendant as to the construction placed upon the allegation in the complaint. It is not equivalent to an allegation that "at the time of the accident in question," which is the important element under the statute, the defendant was a resident of the State of Illinois. As against the inference relied upon by defendant, there is the positive statement in the special appearance that "at the time of the purported accident, she was not within the jurisdiction and subject to

the jurisdiction of the Circuit Court of Cook County, but to the contrary was a resident of the State of Wisconsin". The latter controls the motion to quash in the form made, and the court was correct in denying it.

It is urged by the defendant that the verdict is against the manifest weight of the evidence and that the same is excessive. We have examined the conflicting evidence in this case, and we conclude that it is the type of conflict of evidence which clearly was within the province of the jury to pass upon, and we cannot, upon this record, say that the verdict is against the manifest weight of the evidence. With respect to the excessiveness of the verdict, what we said in Howard v. B. & O. R. R. Co., 327 Ill. App. 83, and cases there cited, applies with equal force in this case.

No other errors are assigned or argued. We believe the judgment of the Circuit Court was correct and it is affirmed.

JUDGMENT AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

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1. 1. The first part of the paper is devoted to a discussion of the
 2. 2. various methods of determining the critical temperature of a
 3. 3. substance, and the results of these determinations are compared
 4. 4. with the values obtained from the equation of state of the
 5. 5. substance.

44035

IN THE MATTER OF THE ESTATE OF
EMILY M. PETIT, Deceased.

CARL BOCKELMAN AND MARY
BOCKELMAN,
Claimants-Appellees,

v.

ANNA F. KEARNEY, Administratrix
de bonis non with the Will
Annexed of the Estate of Emily
M. Petit, Deceased,
Defendant-Appellant.

APPEAL FROM CIRCUIT COURT
COOK COUNTY.

331 A. 620

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

The administratrix de bonis non with the Will annexed of the estate of Emily M. Petit, deceased (hereafter called defendant), appeals from an order of the Circuit court allowing the claim of Carl and Mary Bockelman, husband and wife (hereafter called plaintiffs), on the note of deceased dated November 1, 1939, whereby deceased for value received promised to pay to plaintiffs, on or before 12 months from date, the sum of \$3,000, with interest at 4 per cent per annum payable semi-annually. The claim had previously been allowed in the Probate court.

On the trial in the Circuit court the note was received in evidence, its execution having been proved. The only evidence on behalf of the estate was the testimony of the plaintiff Carl Bockelman, called as an adverse witness. His testimony showed that he had been employed 27 years as an accountant by the Rock Island railroad; that his wife was a niece of the deceased; that in 1933 he began managing the property of the deceased, which consisted of 7 or 8 flat buildings, collecting the rents and taking care of everything in the buildings in the line of handling everything with the tenants, janitor work, general

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repairs; that in 1933 at the request of deceased he moved out of a home on which he had been paying, to the second flat of deceased's 3-flat building at 8214 Eberhart Avenue, Chicago, which he occupied rent free; the other flats rented at \$50 a month; that in 1933 deceased gave him a note for \$3,000, the consideration for which was the loss sustained in moving out of his home and the services he was rendering the deceased on her various buildings; that he first saw the note filed against the estate on the evening of the date it bears at his home on Eberhart avenue; it had already been signed and was in possession of deceased; that he, his wife and deceased talked about the note maybe half an hour; since that talk the note has been continuously in his possession; that neither he nor his wife loaned the deceased \$3,000 or any sum at any time; that the consideration of the note involved herein was managing the various properties of the deceased and taking care of the Eberhart property, and the destruction of the old note dated in 1933; that he destroyed the latter note the day following the receipt of the note involved herein by burning it in the basement of his home. In answer to the specific question: "Is it not the fact that at no time in the year _____ did you furnish her any consideration?" asked for each of the years 1935, 1936, 1937, 1938 and 1939, he answered yes. He further stated that in May 1944 plaintiffs bought from the deceased the property on Eberhart avenue and gave in part payment therefor a certain instalment note for \$2,000, payable \$30 per month with interest at 2 per cent; that in July 1945, after the death of the deceased, he wrote the attorney for her estate advising him that he had a claim "based on services rendered, and for money loaned to Mrs. Petit, that I would like to file in the probate proceedings."

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He admitted on examination that he had no claim for money loaned. He subsequently filed a claim against the estate for \$800 for services rendered the deceased in respect to three pieces of real property.

On the trial the main defense was want of consideration for the note. The instrument recited consideration, the promise of deceased being made "for value received," and on the trial defendant's counsel conceded that the introduction of the note in evidence established a prima facie case. On appeal it is urged for the first time that a fiduciary relation existed between plaintiffs and deceased, thereby throwing an added burden on plaintiffs to establish the good faith of the transaction and consideration for the note; that the evidence fails to show a consideration for the note, and that the trial court erred in certain rulings on the trial, namely in vacating an order directing the plaintiff Carl Bockelman to submit to pre-trial examination; in allowing plaintiffs' counsel to ask leading, suggestive and improper questions, and in excluding defendant's exhibits, being the instalment note of \$2,000 and plaintiff Carl Bockelman's additional claim for \$800 against the estate, mentioned above. No transcript of proceedings on defendant's motion to vacate the order directing Carl Bockelman to submit to pre-trial examination is presented, and this objection cannot be sustained. An examination of the record discloses no error in the court's rulings on the method of examination by plaintiff's counsel. The trial court properly excluded the exhibits offered by defendant.

A prima facie case having been established by the introduction of the note, the judgment must be sustained unless the prima facie case is overcome by the testimony of Carl Bockelman, called for adverse examination. Defendant contends that because of inconsistencies and contradictions the testimony of this

He admitted on examination that he had no claim for money loaned. He subsequently filed a claim against the estate for \$800 for services rendered the deceased in respect to three pieces of real property.

On the trial the main defense was that of counsel for the note. The instrument recited consideration, the value of deceased being made "for value received," and on the trial defendant's counsel conceded that the consideration of the note in evidence established a prima facie case. It was urged for the first time that a fiduciary relation existed between plaintiff and deceased, thereby relieving the burden on plaintiff to establish the good faith of the action and consideration for the note; that the evidence failed to show a consideration for the note, and that the trial court erred in certain rulings on the trial, namely in refusing to order directing the plainiff Carl Rockelmann to submit to cross-examination; in allowing defendant's counsel to ask leading, suggestive and improper questions, and in excluding defendant's exhibits, being the instrument recited of \$800 and plaintiff Carl Rockelmann's additional claim for \$800 against the estate, mentioned above. On transcript of proceedings on defendant's motion to vacate the order directing Carl Rockelmann to submit to pre-trial examination is presented, and it is objected cannot be sustained. An examination of the record discloses no error in the court's ruling on the motion of examination by plaintiff's counsel. The trial court properly excluded the exhibits offered by defendant.

A prima facie case having been established by the introduction of the note, the judgment must be sustained unless the prima facie case is overcome by the testimony of Carl Rockelmann, called for adverse examination. Defendant contends that because of inconsistencies and contradictions the testimony of this

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witness contains its own impeachment, citing Schueler v. Blomstrand, 394 Ill. 600, 617. The answers upon which defendant mainly relies to show want of consideration are to questions asked by defendant's counsel calling for a legal conclusion as to what constituted consideration for the note. The Probate judge and the Circuit court judge have allowed the claim. The latter had the advantage of observing the witness and hearing his testimony. The witness testified to facts showing consideration for the note of 1939 as well as the prior note of 1933. There is nothing in the record to indicate the existence of a fiduciary relation when the first note, payable only to Carl Bockelman, was given. The claim of a fiduciary relation in 1939 rests wholly upon the agency of Carl Bockelman and the relationship of his wife to deceased. There is nothing in the record to indicate impairment of the faculties of the deceased or her inability to handle her affairs. There is nothing to indicate domination of the deceased or any influence over her by either of the plaintiffs. There is no legitimate inference of a fiduciary relationship. If this defense is not an afterthought it should have been raised affirmatively in the trial court, where, as plaintiffs' counsel suggests, plaintiffs might have offered evidence disputing it.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

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NORMAN L. OLSON, as Successor-
Trustee under the provisions of
a Deed in Trust duly recorded
and delivered to him and in pur-
suance of a Trust Agreement
dated June 12, 1926,

Appellee,

v.

ELMORE REAL ESTATE IMPROVEMENT
COMPANY, a corporation,
Appellants.

33111.620²
APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order adjudging it guilty of contempt of court for failure to obey certain orders entered for the production of its books and records and assessing a fine of \$500.

Plaintiff brought suit against the defendant for an accounting under a contract whereby defendant was to sell on a commission basis two large real estate subdivisions owned by plaintiff, charging among other breaches of the contract that defendant had sold certain lots to its nominees at designated prices and thereafter resold same at great profit. September 6, 1946, on petition of plaintiff, the court entered an order directing the defendant to submit for inspection by plaintiff, and to be copied or photographed, "its cash receipts records, bank statements, deposit tickets, journal and general ledger, covering and limited to sales of lots and tracts pursuant to the contract" between the parties. In early October plaintiff filed a petition for a rule on defendant to show cause why it should not be held in contempt for failure to comply with the above order, and for a further order directing defendant to produce for inspection etc., all contracts and orders relating to the sale by defendant or its nominees of lots and

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tracts purchased by defendant in the names of nominees.

Defendant filed an answer and on October 22nd an order was entered directing that defendant produce "for inspection and to be copied or photographed by plaintiff or his duly authorized agent all of its books, records and accounts covering and related to sales of lots and tracts pursuant to the contract, copy of which is attached as Exhibit 'A' to the Complaint herein and to lots and tracts described in the schedule attached to said contract Exhibit 'A', which were purchased in the name of nominees of defendant and sold by defendant, or its respective nominees, to third persons, and that defendant produce for inspection and to be photographed or copied contracts for the sale of such lots by defendant, or its respective nominees, to such third persons." On November 4, 1946 plaintiff filed his petition alleging that attorneys for defendant had notified attorneys for plaintiff that the books and records of the defendant would not be available to the plaintiff or his agent as provided in the order of October 22, 1946, and that thereafter Elmore, president and managing agent of the defendant, refused to produce for inspection any of the books and records of the defendant and stated that he did not intend to allow the plaintiff or his agent to see any of the books and records of the defendant, and praying that a rule be entered requiring Elmore to show cause why he should not be punished for contempt for failure to obey the orders entered September 6th and October 22, 1946 (erroneously referred to in the petition as having been entered on September 4th and October 21, 1946). On the same day an order was entered requiring Elmore^{to} appear before the court November 13, 1946, to which time the prior rule entered against the defendant had been continued, to show cause

trade purchased by defendant in the past and defendant entered directed that defendant produce for inspection to be copied or photographed by plaintiff or his agent and agent all of its books, records and documents and related to sales of lots and specific parcels of land and copy of which is attached as Exhibit 1 to the complaint and to lots and specific parcels of land and to the defendant and to the defendant's agent, which were taken from the defendant's business of defendant and sold by defendant, or the representative nominees, to third persons, as the case may be, for inspection and to be photographed or copied by plaintiff or his agent of a lot by defendant, or the representative nominee, or even third person, on November 13, 1946, and that the defendant, plaintiff and defendant's agent, or the representative nominee, for plaintiff that has been a representative of the defendant would not be liable to the plaintiff or his agent provided in the order of October 23, 1946, and that the defendant, plaintiff and defendant's agent or the representative, or the representative for inspection any of the lots, as required by the defendant and agent that he did not intend to produce to plaintiff or his agent to see any of the lots, or the defendant, and plaintiff and defendant's agent, or the representative to show cause why he should not be held liable for the attempt for failure to obey the order of the court of October 23, 1946 (hereinafter referred to as the order) having been entered on October 23 and November 13, 1946, to On the same day an order was entered requiring the defendant to enter before the court November 13, 1946, to show cause why he should not be held liable against the defendant had been continued, to show cause

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why he should not be held in contempt of court for failure to obey the orders erroneously stated in the order to have been entered on September 3rd and October 21, 1946. To the latter petition Elmore filed his answer, and on November 13, 1946 an order was entered reciting that the cause came on to be heard on the rule theretofore entered requiring the defendant to appear "to show cause why it should not be punished for contempt of court for failure to obey the orders heretofore entered on September 4, 1946 and October 21, 1946, the petition of the plaintiff and the answer thereto of the said defendant, ****and having read the sworn petitions and answers filed on behalf of the plaintiff and the said defendant," and the court having heard the argument of counsel and it appearing that the defendant has wilfully failed and refused to obey the said orders, etc., the court finds and adjudges the defendant to be guilty of contempt of the court and orders that it forfeit and pay to the clerk of the court for the use of the People of the State of Illinois the sum of \$500, etc. By a written stipulation filed in the trial court it was stipulated that the report of proceedings on the matter of the contempt does not contain any evidence, but merely arguments of counsel, and that the stipulation be incorporated in the trial court record in lieu of the original report of proceedings. The record does not show any rule on the defendant to show cause why it should not be punished for contempt of court for failure to obey the order of October 22, 1946. The only petition for a rule on defendant to show cause related to the order of September 6, 1946, and the only answer filed by defendant was in answer to that petition. No order was entered against Elmore, president and managing agent of defendant, on the rule entered against him. Defendant concedes that the order of September 6, 1946 was properly entered. Its sole defense is that it complied with that order. It urges that the court

why he should not be held in contempt of court for
to pay the costs and attorney's fees. The court
been entered on the record. The court
acted petition Illinois State Bar Association
1946 on order and entered judgment that the
to be held on a contempt of court and the
defendant to answer the same. The court
for contempt of court and the defendant
entered on the record. The court
of the defendant and the court
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defendant on the record. The court
having heard the testimony of the defendant
defendant has willfully disobeyed the court
etc., the court finds and enters judgment that the
of contempt of the court and the defendant
the clerk of the court for the use of the court
of Illinois the day of 1946, etc., the court
in the trial court is not sufficient to
find on the basis of the contempt of court
but merely a contempt of court, and the court
incorporated in the trial court for the use of the court
report of proceedings. The court
the defendant to answer the same. The court
contempt of court for failure to pay the costs
1946. The only petition for contempt of court
related to the order of September 6, 1946, and the court
filed by defendant was in answer to the petition
entered against Illinois, or against and entering judgment of contempt
on the rule entered against him. The court considered that the
order of September 6, 1946, was properly entered. The only defense
is that it complied with that order. It appears that the court

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should have heard evidence on this question and that its failure to do so amounted to denial of due process of law. So far as the record shows, the parties submitted the cause to the court on petition and answer, neither party offering affidavits supporting their contention or requesting the right to introduce other evidence. The matter was heard in the usual and ordinary manner in which such matters have been uniformly heard and disposed of under the established practice in this state. Hence, there was no denial of due process of law.

Rothschild & Co. v. Steger Piano Co., 256 Ill. 196. The question presented on this appeal is whether or not, upon the petition and answer filed, the court properly adjudged defendant guilty of contempt.

The burden of proving the charges made is upon the plaintiff Kneisel v. Ursus Motor Co., 323 Ill. 452, 458. The petition, as above stated, not only charged defendant with failure to produce for inspection, etc., all general ledger accounts and supporting records of original entry to enable plaintiff to acquire the information desired, but also asked for an extension of the order of production to include contracts and records relating to lots and tracts purchased by defendant in the name of nominees. The answer of the defendant denied any refusal to submit for inspection, etc., any books, records or accounts relating to sales of lots and tracts pursuant to the contract between the parties, and affirmatively states that defendant gave to plaintiff's auditor full and complete access to all accounts, books and records pertaining to the contract involved herein; that it sealed up its books and records so that only the transactions under the contract would be shown. Other allegations in the answer relating to the merits of the cause are immaterial, as the merits of the case cannot be tried on a motion for the production of the books (Denison Cotton Co. v. Schermerhorn, 257 Ill. 128), or on a rule

should have heard evidence on this question and that it
failure to do so amounted to denial of due process of law.
So far as the record shows, the parties submitted the case
to the court on petition and answer, neither party or either
affidavits supporting their contention or recusal. The right
to introduce other evidence. The case was heard in the court
and ordinary manner in which such matters have been formerly
heard and disposed of under the established practice in this
state. Hence, there was no denial of due process of law.
Northfield & Co. v. Standard Oil Co., 255 Ill. 122. The court
presented on this appeal is whether or not, upon the petition and
answer filed, the court properly refused to grant relief at
contempt.

The burden of proving the charges made in a petition is
Amesbury v. Amesbury, 255 Ill. 417, 420. The petition, as
above stated, set only charges against defendant with failure to pro-
duce for inspection, etc., of certain ledger accounts and other
records of original entry to enable plaintiff to ascertain the
information desired, but also asked for an extension of the order
of production to include contracts and records relating to jobs
and trusts purchased by defendant in the case of certain
answer of the defendant denied any right to demand the production
of books, records or accounts relating to sales of jobs
and trusts purchased to the contract between the parties, and
affirmatively stated that defendant was not indebted to plaintiff
full and complete access to all accounts, books and records
pertaining to the contract involved herein; that it would not
its books and records so that only the transactions under the
contract would be shown. Other allegations in the answer relating
to the merits of the cause are immaterial, as the merits of the
case cannot be tried on a motion for the production of the books
(Amesbury Cotton Co. v. Schenck, 255 Ill. 122), or on a writ

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to show cause for failure to comply with an order requiring the production of such books. The matter having been heard on the sworn petition and answer, the trial court was in no better position to determine the sufficiency of the proof as to the alleged noncompliance with the orders of the court than is this court. There are no inherent defects or self-contradictions in either the petition or answer. There are no independent facts or circumstances detracting from or adding to the statements in the petition or the answer. It therefore cannot be said that the plaintiff has sustained the burden of proof as to the alleged failure to comply with the order of September 6, 1946. There having been no rule to show cause or request for such a rule against the defendant as to the order of October 22, 1946, there is no basis for any order finding defendant guilty of contempt for failure to comply with that order. The penalty was imposed for violation of both orders. Unless it can be upheld as to both, the order fixing it must be reversed. Thomas v. Collins, 323 U. S. 516.

The order appealed from is reversed.

ORDER REVERSED.

Connor, P. J., and Feinberg, J., concur.

to show cause for failure to comply with an order requiring the production of such books. The matter having been heard on the sworn petition and answer, the trial court was in no better position to determine the veracity of the proof as to the alleged noncompliance with the order of the court than in this court. There are no relevant facts or circumstances in either the petition or answer. There are no independent facts or circumstances established from or by the statements in the petition or the answer. It therefore cannot be said that the plaintiff has sustained the burden of proof as to the alleged failure to comply with the order of September 5, 1940. There having been no rule to show cause or request for such a rule against the defendant as to the order of October 23, 1940, there is no basis for any order of this defendant guilty of contempt for failure to comply with that order. The penalty was imposed for violation of said order. Unless it can be said as to both, the order fixing it must be reversed. Thomas v. Collins, 13 U. S. 85.

The order appealed from is reversed.

W. H. H. H.

Donner, J., and Robinson, J., concur.

RESERVE BOOK

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This reserve book is NOT transferable and must NOT be taken from the library ~~except when charged out for overnight use.~~
You are responsible for the return of this book.

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